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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

DENNIS DICK,

Petitioner,

-v.-

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the trial court erred in finding that Petitioner's confession was admissible after a Jackson v. Denno hearing at which there was evidence of coercion, involuntariness and that the confession was taken without scrupulously honoring Petitioner's Fifth and Fourteenth Amendment rights to counsel and to remain silent.

2. Whether the trial court's failure to instruct the jury as to the lesser included offenses of voluntary manslaughter and felony murder violated Petitioner's Sixth, Eighth and Fourteenth Amendment rights by substantially increasing the risk of error in the factfinding process.

3. Whether the exclusion of prospective jurors for cause on the ground of opposition to the death penalty violated Petitioner's Sixth and Fourteenth Amendment rights where such opposition was expressed ambivalently or was accompanied by a clear expression of willingness to abide by the law and the juror's oath.

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

Petitioner, Dennis Dick, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia affirming petitioner's murder conviction and death sentence in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at ___ Ga. ___, 273 S.E.2d 124 (Ga. 1980) and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on November 5, 1980. A timely petition for rehearing was denied on November 25, 1980. On January 22, 1981, Justice Powell granted petitioner's motion to extend the time to file this petition to and including February 23, 1981. This Court's jurisdiction is

invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

the Sixth Amendment, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a... trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

the Eighth Amendment, which provides in relevant part:

> ". . . . nor cruel and unusual punishments inflicted,"

and the Fourteenth Amendment, which provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

This case also involves Ga. Code Ann., §26-1101 which provides:

> "(a) A person commits murder when he unlawfully and with malice aforethought either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice."

This case also involves Ga. Code Ann., §26-1102, which provides in relevant part:

> "A person commits voluntary manslaughter when he causes the death of another human being, under circumstances which would otherwise be murder, if he acts solely as the result of a sudden, violent, and irrestible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. . ."

STATEMENT OF FACTS

On the evening of June 2, 1979, O.C. "Red" Rider was shot and killed during an armed robbery in Dawson County, Georgia. Rider, who was 55 years old at his death, had lived in Dawson County all of his life, and was well-known among its 5,000 citizens as a bootlegger and owner of an after-hours bar. The robbery and killing took place at the trailer in which Rider conducted his business. Dawson County Sheriff John Davis arrested petitioner Dennis Dick ("Petitioner") at approximately 8:00 A.M. the next morning at the trailer home of co-defendant Christopher Hoerner based on a license plate which fell from Hoerner's car at the scene of the crime. Hoerner and a third co-defendant, Billy Webster, were later arrested and, along with Petitioner, charged with armed robbery and the murder of "Red" Rider. At separate trials, Petitioner was convicted of murder and armed robbery and sentenced to life imprisonment and death, Hoerner was convicted of both crimes and sentenced to life and Webster was acquitted.

Arrest and Detention

Upon his arrest, Petitioner was taken to the Dawson County jail by Sheriff Davis and Sheriff's Detective Russell Matthews. The Sheriff had informed Petitioner of his constitu-

tional rights at the time of his arrest and at 9:15 A.M. Petitioner signed a waiver of rights form at the Dawson County jail (Defendant's Exhibit 1, T. 1316).* Petitioner refused to make a statement or answer any questions without first talking to a lawyer, despite repeated requests throughout the day by Davis and Matthews that he do so (T. 988-989, 1043). At the time of his arrest, Petitioner was an alcoholic (T. 1356, 1389-91). It was undisputed that he was intoxicated when he shot and robbed "Red" Rider.

At approximately 6:00 P.M. on the evening of Petitioner's arrest, his twin brother, Donald Dick, arrived at Dawson County jail and asked to see Petitioner**. He was allowed to see him, but was first told by Detective Matthews that evidence had already been seized in the investigation (T. 985-987), including a blood-stained rug (T. 986, 990-91) and a metal box; Donald Dick testified that Matthews told him the box was the cash box taken from the Rider trailer the previous night. (T. 1019) Detective Matthews admitted at the Jackson v. Denno

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* Each reference to the transcript of Petitioner's trial in the Superior Court of Dawson County will be indicated by the letter "T." followed by the page or pages at which the reference may be found.

** Donald Dick was told of his brother's arrest by Petitioner's wife (T. 1017), who was at the Hoerner trailer babysitting at the time of Petitioner's arrest (T. 1013, 1312-13). Detective Matthews testified that Petitioner asked to use the phone, (T. 984) but that he never saw or heard Petitioner on the telephone on the day of the arrest. (T. 987, 990) Sheriff Davis testified that he heard Petitioner on the telephone, but did not know to whom Petitioner was speaking (T. 13, 17-18). Petitioner testified that he repeatedly asked to make a phone call in order to contact a lawyer before he make a statement, but that each time he asked he was refused. (T. 1043-1045)

hearing that they had not yet found Rider's cash box at the time Donald Dick came to see Petitioner. (T. 986-87)

At the Jackson v. Denno hearing, Donald Dick testified that, prior to seeing Petitioner, Detective Matthews told him

> "they had the gun that he shot the man with. [Matthews] said they had a sawed-off shotgun that one of them had. He said they had the cash box that the money came out of. He said they had the tag off the car. He also said they had the blood off of [Petitioner's] boots * * *
>
> "And he told me that somebody had to talk to Dennis, because if somebody didn't talk to him and get him to confess, that he would go to the chair, because those people up here was Mr. Rider's friends and they would be sitting on the jury, and that if he did not confess he would get the chair." (T. 1019)

After Donald Dick and Detective Matthews spoke "for a long time" (T. 1020), Sheriff Davis came in and Detective Matthews told Sheriff Davis that Donald wanted to speak to Petitioner. Sheriff Davis at first refused, but Matthews "winked at him and then he said all right." (T. 1021) Petitioner was then brought in to talk with his brother, who testified that his only purpose in talking to Petitioner was to "get him to confess, so he wouldn't go to the electric chair." (T. 1021)

The entire conversation between Petitioner and his brother took place in private (T. 1318). Petitioner was wearing nothing but a pair of pants (T. 1023), and Donald Dick testified: "He was nasty. He was shaking. Tears were in his eyes. He looked like he was about to fall to pieces." (T. 1023) After being told by his brother what Detective Matthews had said, Petitioner, who had not eaten at least since his arrest ten hours earlier (T. 1296), and was suffering from alcoholic withdrawal, "started shaking and tears came to his eyes." (T. 1024) He agreed to make a statement in the belief that it was his only

chance to avoid electrocution.* This belief was based solely upon what Petitioner had been told by his brother who in turn had been convinced that this was the case by Detective Matthews. (T. 1027, 1050)

Petitioner's confession was tape recorded and later transcribed. The recorded confession was admitted into evidence (State's Exhibit 16) over defense objection (T. 1249-50), and played for the jury. (T. 1253-62) In his confession, Petitioner stated that he, Hoerner and Webster only came up with the idea of robbing Rider on the way to get some beer and that once in Rider's trailer, when Petitioner pulled out a gun and told Rider to give him the money, Rider refused. According to Petitioner, "he just he he [sic] started towards me and I got scared and I pulled I pulled [sic] the trigger. I didn't mean to shoot him." (T. 1255)

The Jury Selection

On voir dire, the prospective jurors generally displayed extensive knowledge of the circumstances surrounding the crime, and familiarity with Rider and his family**. Juror Fay Turner Grant (T. 186) was the mother of prosecution witness Teresa Grant who testified that she was threatened at gunpoint by Petitioner.

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* Q: [by defense counsel]: Did you think that by confessing you would stay out of the electric chair?

A: [by Petitioner]: Yes, sir, I did. That's the only reason that I confessed. (T. 1049).

** For example, when venireman John Law Evans was asked, "Have you formed an opinion about this case?" he answered, "About like everybody else in Dawson County, I guess." (T. 249) The court commented during voir dire that "I don't know of any one person in the county that hasn't heard something about the case." (T. 438)

(T. 1153-65) Of the other jurors selected, two other selected jurors admitted prejudice against Petitioner*. Eight of the selected jurors either knew the victim or his family**, or were familiar with the circumstances of the crime*** or both+. The twelfth juror, Janice Tatum Whitmire, (T. 803-6) was qualified without any inquiry into her knowledge of the crime or familiarity with the Rider family.

Seventeen prospective jurors were disqualified for cause on the ground of their opposition to the death penalty. Included among these were two who testified that their opposition would not prevent them from being impartial as to guilt and would not lead them automatically to vote against the death penalty (T. 166, 877) and two who were unsure what effect their opposition would have. (T. 243, 602)

During voir dire, the decedent's son and daughter sat at the prosecution table notwithstanding defense counsel's objection that this inevitably created an impression on prospec-

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* Phillip J. Moore said that he could not completely forget his pre-conceived opinion as to what had taken place, and had read in the paper that Petitioner was involved in the crime. (T. 436); Barbara Eller Wigington admitted that she believed, based on rumors, that defendant was guilty (T. 499) and stated three times that she did not know whether she could be impartial. (T. 495-501, 501-502)

** Violet Cooper Byrd (T. 326), Mary Slayter Saphire (T. 334), Rita Beck Kittle (T. 355), and Marvin Charles Owen (T. 456-59) knew the victim or his family. Owen had known the family for thirty-five years, and also knew Teresa Grant, a prosecution witness and daughter of juror Fay Turner Grant.

*** Melvin Jackson Loggins had "read all about it" (T. 265); Eugene E. Kent (T. 459) and Fannie Hardin Reagan (T. 639) were also familiar with the circumstances of the crime.

\+ Larry L. Lowman (T. 503) had read about the crime and also knew "Red" Rider.

tive jurors that decedent's family, and not the State of Georgia, sought the death penalty. (T. 159-166). Tommy Rider, the decedent's son, testified at trial for the prosecution (T. 1191 et seq.) to establish that money had been taken from the trailer on the night of the robbery. Tommy Rider was also shown a photograph of his father's body (State's Exhibit 2, T. 1201), ostensibly to corroborate prior testimony as to the position in which the body had been found, (T. 1205) although the defense offered to stipulate to that fact. (T. 1180-81)

Following the presentation of all witnesses and evidence, the jury was instructed as to the elements the crime of malice murder (T. 1463-1466) and as to the separate charge of armed robbery. (T. 1466-1467). No instructions were given by the Court on either of the lesser included offenses of voluntary manslaughter or felony murder.

Since his conviction, Petitioner has remained in the Dawson County jail. Detective Matthews testified at trial that Petitioner was "one of the best [prisoners] that I have probably had." (T. 1293-94) Most prisoners awaiting the death sentence in Georgia are transferred to the Georgia Diagnostic & Classification Center at Jackson, a maximum security facility.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The illegality of the confession was raised at trial by Petitioner's Motion to suppress the confession and the evidence uncovered as a direct result of it. A Jackson v. Denno hearing was held on voluntariness and the trial court determined that there was sufficient legal basis to admit the confession into evidence at trial. (T. 973-1068) A motion for mistrial or for a directed verdict of acquittal was made after the tape recording of the confession was played for the jury. That motion was denied. (T. 1251) On appeal, the Supreme Court of Georgia upheld the voluntariness of the confession, finding that any coercion was solely the product of Petitioner's brother's urging, and not threats or unlawful interrogation by the Sheriff and Detective. The Supreme Court of Georgia also relied on the fact Petitioner reiterated his guilt at trial to support its holding that there was no error in admitting the confession. Dick v. State, ___ Ga. ___, 273 S.E.2d 124, 129-30 (1980).

The confession was not expressly challenged below on the ground that it was obtained in violation of Petitioner's rights under Miranda v. Arizona, 384 U.S. 436 (1966). However, the ground of attack was that the confession was "illegally obtained" and there was extensive evidence regarding the giving of Miranda warnings, especially before Petitioner confessed, at both the Jackson v. Denno hearing and at trial. The trial court expressly found that the Miranda warnings were given on the morning of Petitioner's arrest, but made no finding as to whether they were given again before the confession, despite testimony in that regard. (T. 1065) The Supreme Court of Georgia, however, found that

Petitioner had been advised of his rights for a second time before he confessed and relied on this finding for it holding of voluntariness. 273 S.E.2d at 129. The factual issues underlying the violation of Petitioner's Fifth and Fourteenth Amendment rights under Miranda are, therefore, properly before the Court. The Miranda violation was encompassed in trial counsel's objection on the ground that the confession was illegally obtained.

2. Petitioner raised the failure to give instructions on lesser included offenses as his eleventh enumeration of error on appeal. The Supreme Court of Georgia rejected this argument on the ground that no written request was made at trial. 273 S.E.2d 132. However, Georgia law allows the trial court to instruct the jury on lesser included offenses at its discretion, and this Court's opinion in Beck v. Alabama, ___ U.S. ___, 100 S.Ct. 2382 (1980) makes failure to give such instructions where justified in a capital case constitutional error.

3. In his first enumeration of error on appeal, Petitioner alleged that prospective jurors had been disqualified in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). This contention, also raised on voir dire by Petitioner, was summarily rejected by the Supreme Court of Georgia, 273 S.E.2d at 129.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INTRODUCTION INTO EVIDENCE OF PETITIONER'S STATEMENT OBTAINED DURING HIS ALCOHOLIC WITHDRAWAL AND AFTER HE HAD ASKED TO HAVE AN ATTORNEY PRESENT VIOLATED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS

This case presents a serious question as to constitutionality of the confession. Petitioner made the statement, which was tape recorded, on the day of his arrest and the prosecution introduced it into evidence at trial over proper objection. (T. 1253) Petitioner submits that the confession was obtained in violation of his Fourteenth Amendment right to due process in that it was not voluntary, and of his Fifth and Fourteenth Amendment rights against self-incrimination. Miranda v. Arizona, 384 U.S. 346 (1966); see, Malloy v. Hogan, 378 U.S. 1 (1964).

A. The Involuntary Character of the Confession

A conviction based in part on an involuntary confession must be reversed without regard to truthfulness of the confession or the other evidence of guilt adduced at trial. Jackson v. Denno, 378 U.S. 368, 376 (1964); Mincey v. Arizona, 437 U.S. 385, 398 (1978). It has long been established by the Court that "the question of whether a confession was voluntarily made necessarily turns on the totality of the circumstances in any particular case . . . ." Boulden v. Holman, 394 U.S. 478, 480 (1969); Culombe v. Connecticut, 367 U.S. 568, 606 (1961). In this case, Petitioner submits that the totality of circumstances surrounding his confession rendered it involuntary and therefore,

inadmissible under the Due Process Clause of the Fourteenth Amendment to the Constitution. The trial court erred in ruling that the confession was freely and voluntarily made and in permitting it to be introduced into evidence at trial (T. 1064-5); the Supreme Court of the State of Georgia erred in holding that admission of the confession did not violate Petitioner's Federal constitutional rights. Dick v. State, supra, 373 S.E.2d at 129-30.

Petitioner, aged twenty-eight at the time of his arrest, had been an alcoholic since his early teens. In the months preceding the crime, his drinking habit spanned almost the entire time he was awake, starting at breakfast and continuing through the work day into the evening. (T. 1390-1391) He and his co-defendants went to Rider's trailer on the night of June 2, 1979 to buy beer having already consumed one-half case of beer that evening. (T. 1558-9)

At the time of his arrest, Petitioner was wet and tired, having been out in the rain the night before. (T. 982-83) He was without food from at least the time of his arrest at approximately 8:00 a.m., until he confessed almost twelve hours later. Detective Matthews testified that breakfast is served at 6:00 a.m. in the County jail, and lunch is not served at all (T. 992); cf. Culombe v. Connecticut, supra, 367 U.S. at 608.

It is undisputed that after executing a waiver of rights form, Petitioner refused to make any statement and immediately requested an opportunity to talk to a lawyer. (T. 1043) Detective Matthews testified that he "didn't recall [Petitioner] asking for a lawyer." (T. 1001) Donald Dick testified at the voluntariness hearing that Petitioner "told me that he needed to see a

lawyer, that they wouldn't let him call no lawyer or nothing, and he needed to see a lawyer." (T. 1637)

The following exchange took place between the prosecutor and Donald Dick at the hearing with respect to Petitioner's request for counsel:

> BY MR. WAYNE [Prosecutor]:
>
> Q. Did Mr. Dick ask you, when you talked to him, to get him an attorney?
>
> A. He told me that he needed to talk to a lawyer, that he hadn't got to see one, and that he needed to see one. That was his first words.
>
> Q. Did you call him an attorney, at that time?
>
> A. Not after what -- Detective Matthews told me that it wasn't no sense in getting him a lawyer, because it would do nothing but just cost a bunch of money for nothing, because he was guilty and there was no way to get out of it. (T. 1034-40)

In addition to being told that a lawyer would be useless to Petitioner because of the overwhelming evidence which the investigation had supposedly yielded already, Donald Dick testified on cross-examination that Detective Matthews told him that Petitioner "would get the chair if he didn't confess . . . [Matthews] said he wasn't making any promises that he wouldn't get the chair, but he said he would definitely get the chair if he did not confess." (T. 1029)

Petitioner's own testimony at the hearing revealed that he had asked for a lawyer, had been subjected to repeated requests to make a statement, finally signed the waiver of rights form, and then reiterated his request for a lawyer before he would make a statement. (T. 1043) When he asked to use the telephone, Detective Matthews told him, "We'll get to it later." (T. 1044) Repeated requests by Petitioner to use the telephone were denied

during the twelve hours between his arrest and his statement. "It was month and a half after I was in jail . . . before I got to use the phone." (T. 1045) Detective Matthews testified at the Jackson v. Denno hearing that Petitioner had asked to use the phone (T. 984, 989), but testified at trial that he had not asked to do so. (T. 1292)

Petitioner also corroborated Donald Dick's testimony that the first thing he asked Donald about was getting a lawyer. (T. 1047) "[D]efendant's lack of counsel [during questioning is] one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness." Cicenia v. La Gay, 357 U.S. 504, 509 (1958).

Petitioner also described his private conversation with Donald and the state of mind in which it placed him. He stated that his sole reason for confessing was his belief that not confessing would result in a certain death sentence because of the evidence against him and the local prejudice he would face at trial in decedent's home county. (T. 1048-49) "I wouldn't have never said anything without a lawyer," he testified (T. 1049) and his statement was made after repeated requests for an attorney, or access to a telephone to obtain an attorney, were denied. There was no testimony at the hearing that Petitioner was ever allowed to use the telephone*.

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* Sheriff Davis sat in the courtroom throughout the trial and all pre-trial proceedings. He was also charged with supervising the jurors. (T. 1307-45; see T. 1490-91) He testified that Petitioner made a telephone call, but he did not know to whom. He testified that the telephone call was made on the morning of the arrest, and that he assumed Petitioner called his brother because "it wasn't too much

(Footnote continued)

B. The Miranda Violations

In concluding that the confession was voluntary and therefore admissible, the trial court specifically found that Petitioner had been given his rights on the morning of the arrest. (T. 1065) There was no finding that he was admonished as to his rights prior to making his statement that evening. This finding is corroborated by the waiver of rights form (Defendant's Exhibit 1), which Petitioner signed but once, at 9:15 A.M. on June 3, 1979. Only Donald Dick and Sheriff Davis signed it prior to taping the statement at "19:35". There was no finding that the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), were given at the time the statement was taken.

The testimony of Detective Matthews as to when Petitioner was warned of his rights and what rights were given is a mass of internal contradictions. At first, he testified that he advised Petitioner of his rights before he confessed (T. 978, 981); then he testified that Sheriff Davis gave him his rights that evening. (T. 1003) At trial, he again testified that he had read the rights (T. 1230), then stated he did not know if the rights had been read at that time. ("I assume the sheriff did," T. 1295) Finally, Matthews testified that not he, but Sheriff Davis, had given them (T. 1235), and his testimony as to what, if any, rights were given Petitioner on the evening of his arrest reveals that

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(Footnote continued)

longer after that till his brother arrived." (T. 1317) Three questions further into direct examination, Sheriff Davis testified that "it was later in the day when he talked to his brother. I'm not sure who he talked to . . . ." (T. 1318) Aside from the internal inconsistency of this testimony, it was not before the trial judge at the voluntariness hearing.

Matthews omitted to instruct him that anything he said could and would be used against him at trial. (T. 979, 1230) This is a per se violation of the rule in Miranda v. Arizona and renders the confession inadmissible. Miranda v. Arizona, supra 384 U.S. at 444; Michigan v. Mosely, 423 U.S. 96, 100-01 (1975).

Thus, aside from the coercive circumstances of Petitioner's physical condition and the threats communicated to him by his brother from Detective Matthews, Petitioner's expressed wish not to answer questions or make any statement without first consulting an attorney was not "scrupulously honored" as required by this Court. Michigan v. Mosely, supra, 423 U.S. at 104 (1975) quoting Miranda v. Arizona, supra 384 U.S. at 479.

It is undisputed that Petitioner refused to answer questions or make any statement for ten hours following execution of the waiver. Detective Matthews requested several times that Petitioner make a statement despite such refusals. (T. 988-89, 1296) Furthermore, Matthews showed Petitioner the blood-stained rug taken from Rider's trailer.* (T. 986, 990-91) As recently defined in Rhode Island v. Innis, __ U.S. ___, 100 S.Ct. 1682 (1980), "interrogation" for Fifth Amendment purposes includes any "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect . . . ." ___ U.S. ___, 100 S.Ct. at 1689; as such, showing Petitioner the rug clearly constituted interrogation.

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* Matthews testified at the Jackson v. Denno hearing that he could not recall why he showed Petitioner the rug "unless it had something to do, maybe, with shoes." Petitioner's shoes had been taken from him for examination of blood samples. (T. 990-91, 1019).

The interrogation of Petitioner after his adoption of the rights to remain silent and to have an attorney and the failure to give Miranda warnings before the statement was taken are factors bearing on the voluntariness of Petitioner's statement. Davis v. North Carolina, 384 U.S. 737 (1966).

C. Conclusion

After refusing to talk to the authorities for ten hours, and repeatedly requesting an attorney, Petitioner's mind was changed only after his will had been overcome. Hungry, shaking, crying and half-undressed, he confessed "because I was scared to death. I didn't want to go to the electric chair . . .." (T. 1049) In sum, the trial court erred in finding that the confession was freely and voluntarily made.*

It is respectully submitted that this case deserves the Court's independent evaluation of the record and circumstances surrounding Petitioner's statement. Mincey v. Arizona, supra, 437 U.S. at 398; Spano v. New York, 360 U.S. 315, (1959); Norris v. Alabama, 294 U.S. 587 (1935). Such an evaluation, Petitioner submits, will require a finding that the statement was not "'the product of a rational intellect and a free will,'" Townsend v. Sain, 372 U.S. 293, 307 (1963), quoting Blackburn v. Alabama, 361 U.S. 199,208, but rather was taken in violation of Petitioner's Fifth and Fourteenth Amendment rights.

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* The trial court had some apparent misgivings about the statement at the time of Petitioner's motion for a mistrial or directed verdict of acquittal. Prior to the charge to the jury, the court stated, "my impression of the statement . . . is that it was taken informally, probably, to say the least, too informally." (T. 1333)

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AS TO LESSER INCLUDED OFFENSES VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

A. The Trial Court's Failure to Instruct

In its decision last term in Beck v. Alabama, ___ U.S. ___, 100 S.Ct. 2382 (1980), this Court reversed a judgment of the Alabama Supreme Court, affirming a conviction of murder and a sentence of death, because the jury was not permitted to consider a verdict of guilty to a lesser included offense and the evidence would have supported such a verdict.

In Beck, the defendant was convicted of murder committed in the course of a robbery. Notwithstanding the fact that at trial the nature of the defendant's intent was much disputed, the jury was not instructed on any lesser included offenses to the murder charge, such as simple assault, not requiring proof of an intent to commit great bodily injury. As a result, the jury's only option was to convict on the capital offense or to acquit the defendant entirely. The failure of the trial court to charge as to lesser included offenses stemmed from a provision in the Alabama death penalty statute, Ala. Code §13-11-2(a), which prohibited the trial judge from giving the jury the option of convicting the defendant of a lesser included offense.

This Court reversed the jury's sentence of death, and invalidated the prohibition of the Alabama statute, reasoning that the defendant in a capital case was entitled to the protection of lesser included offense instructions. As stated by Justice Stevens, writing for the majority:

"providing the jury with the 'third option' of convicting on a lesser included offense insures that the jury will accord the defendant the full benefit of the reasonable doubt standard." Beck, supra, 100 S.Ct. at 2387, citing Keeble v. United States, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995 (Brennan, J.)

In concluding that the Alabama statute's preclusion of lesser included offense instructions did not withstand constitutional scrutiny, Justice Stevens relied on the longstanding state and federal practice of providing lesser included offense instructions where warranted by the evidence, and emphasized the increased risk in failing to provide this procedural protection in a capital case. Justice Stevens stated:

> "When the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense - but leaves some doubt with respect to an element that would justify conviction of a capital offense - the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." Beck, supra, 100 S.Ct. at 2389.

The Petitioner in the instant case was separately charged and convicted of malice murder* and armed robbery.**

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* Malice murder is defined in Ga. Code Ann., §26-1101(a) which provides:

> "A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart."

** Under Georgia's bifurcated death penalty proceedings, the armed robbery conviction was further considered by the jury

(Footnote continued)

With respect to the homicide charge, the trial court charged the jury only as to the crime specified in the indictment, malice murder. (T. 1463-1464) No charge was given as to either of the lesser included offenses of voluntary manslaughter*, or felony murder**. Thus, at the guilt phase of the trial, the jury, in this case as in Beck, was left only with the choice of convicting the defendant of the capital offense of malice murder or acquitting the defendant of the homicide. Petitioner submits that, dependent only on the existence of evidence in the record sufficient to justify the giving of lesser included offense instructions,***

(Footnote continued)

in the penalty phase as an aggravating circumstance justifying a sentence of death as opposed to life imprisonment. The statutory differences between the Georgia statute and the Alabama statute do not, however, affect one way or the other the constitutional infirmity raised in Petitioner's case. The failure of the trial judge in the instant case to give lesser included offense instructions where warranted by the evidence created the same risk as that created by the Alabama statute in Beck, namely, that in the conviction phase, the jury's options were limited to convicting for the capital offense or acquitting of the killing.

* Voluntary manslaughter is defined in Ga. Code Ann., §26-1102 which provides in relevant part:

"A person commits voluntary manslaughter when he causes the death of another human being, under circumstances which would otherwise be murder, if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. . . ."

** Felony murder is defined in Ga. Code Ann., §26-1101(b) which provides:

"A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice."

*** Under Georgia state law, the quantum of proof needed to justify the giving of a lesser included offense instruction, when requested, is whether there is any evidence to support a conviction of the lesser offense. Jackson v. State, 239 Ga. 40 (1977); State v. Stonaker, 236 Ga. 1 (1976); Loury v. State, 147 Ga. App. 152 (1978).

Beck requires a reversal of the death sentence due to the failure to provide the Petitioner with the due process protection of such instructions.

B. Evidence in the Record Warranting the Giving of Lesser Included Offense Instructions

The record at trial establishes the existence of evidence indicating that Petitioner lacked the requisite intent to commit malice murder by reason of involuntary intoxication induced by chronic alcoholism. (T. 1390-1391) Evidence also exists that the Petitioner may have been provoked by the victim within the meaning of the Georgia voluntary manslaughter statute. For example, the Petitioner testified at trial:

> Q. Did you mean to shoot the first time?
>
> A. No, Sir, I didn't. When he turned around and started for me, I just shot. I didn't mean to shoot him." (T. 1395)

Notwithstanding the clear existence of evidence demonstrating a lack of requisite intent to commit the capital offense and justifying the giving of lesser included offense instructions, the trial court failed to charge the jury on the lesser included offenses*. Left with a choice of convicting for malice murder or acquitting Petitioner of the homicide, the jury returned a verdict of guilty on the capital offense.

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* In its decision affirming the Petitioner's death sentence, the Supreme Court of Georgia dismissed this enumeration of error on the ground that under Georgia state law, "[t]here is no requirement that a charge on a lesser included offense be given in the absence of a written request . . . ." See e.g., Lamb v. State, 245 Ga. 104, 263 S.E.2d 143 (1980); Jackson v. State, 239 Ga. 40 (1977). While it is true that no such request was made by defense counsel below, Petitioner submits that the due process protection extended by the Court in Beck is not properly limited to a situation where a request to charge is made by defense counsel.

C. Conclusion

Petitioner submits that the risk addressed by this Court in its decision in Beck has fully materialized in this case. There is evidence in the record in this case which supports the positition that, as a result of the failure to charge as to the lesser included offenses, the Petitioner, a twenty-eight year old man with no prior record of conviction of any violent crime, who got drunk with his friends, decided to hold up a local bootlegger, got scared when the victim started towards him, and shot him, was convicted of malice murder and sentenced to die.

This Court took the position in Beck that:

> "[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case." Beck, supra, 100 S.Ct. at 2390.

Petitioner submits that the same unavailability of a lesser included instruction has led to the same constitutional infirmity, notwithstanding the fact that it was the judge's failure to charge and not a statutory prohibition to so charge that resulted in withdrawing from the jury the option of convicting of a lesser included offense. Petitioner respectfully submits that this Court's decision in Beck requires that Petitioner's death sentence be reversed or that the conviction be vacated and the case remanded for further review in light of Beck.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DISQUALIFICATION FOR CAUSE OF FOUR JURORS WITH CONSCIENTIOUS OR RELIGIOUS SCRUPLES AGAINST THE DEATH PENALTY VIOLATED THE COURT'S HOLDING IN ADAMS V. TEXAS, __ U.S. __, 100 S. Ct. 2521 (1980).

Just last Term, this Court in Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980) reaffirmed its consistent teaching that the Sixth and Fourteenth Amendments do not permit a state to challenge prospective jurors for cause merely because of their "views about capital punishment, unless those views would prevent or substantially impair the performance of [their] duties. . . ." Accord: Witherspoon v. Illinois, 391 U.S. 510 (1968); Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); Mathis v. New Jersey, et al., 403 U.S. 946 (1971) (per curiam); Davis v. Georgia, 429 U.S. 122 (1976). The Court in Adams reiterated that only those veniremen may properly be excluded

> "'who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."' Adams v. Texas, supra, 100 S. Ct. at 2325, quoting Witherspoon v. Illinois, supra, 391 U.S. at 522-523, n.21.

In the present case, the trial court permitted excusal of four prospective jurors in violation of Witherspoon and Adams.

First, prospective juror Beverly Decak Abbott testified that her attitude toward the death penalty would not prevent her

from making an impartial decision as to guilt (T. 601)*. She further testified: "I don't think I would automatically vote against the death penalty." (T. 602) Upon voir dire by Petitioner's trial counsel, she testified that she would obey the law and that she "believe[d]" she would not vote for the death penalty. (T. 603) This sort of testimony falls far below the "unmistakably clear" standard to which the Court has limited exclusion for cause of veniremen opposed to the death penalty.

Similarly, prospective juror Janice Winkler Harben testified that she did not think that her opposition to the death penalty -- predicated on religious beliefs -- would prevent her from making an impartial decision as to Petitioner's guilt, and that "it would be hard to say" whether she would automatically vote against the death penalty without regard to any evidence that might be produced on the trial of the case. (T. 243) She never made a stronger statement of impairment than responding to the question "[t]hen, under no circumstances, would you vote for the death penalty?", by saying "I don't think so." (T. 244) "As the voir dire examination of this venireman illustrates, it cannot be assumed that a juror who described himself as having ...religious scruples against the infliction of the death penalty... thereby affirms that he would never vote in favor of it or that he would not consider doing so in the case before him." Witherspoon v. Illinois, supra, 391 U.S. at 515, n. 9.

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* Adams v. Texas, supra, expressly extended the holding of Witherspoon v. Illinois, to the bifurcated procedure in capital trials. 100 S. Ct. at 2526-27.

No fair reading could find in the equivocal responses of Ms. Abbott and Ms. Harben an "unmistakably clear" resolve "automatically" to vote against the death penalty. Further, Ms. Abbott categorically denied that her judgment would be impaired as to Petitioner's guilt or innocence.

Nor can prospective juror David C. Ingram's removal be justified under Witherspoon and Adams. Mr. Ingram testified during a lengthy voir dire (T. 875-886) that he was not conscientiously opposed to capital punishment (T. 875), did not think his attitude toward capital punishment would prevent him from making an impartial decision on guilt (T. 876), would not automatically vote against the death penalty, could follow the law (T. 877), and that he would give equal consideration to sentences of life imprisonment and death. (T. 882) Then, on examination by the prosecutor, he testified "I don't know whether I'm supposed to judge" whether to impose the death penalty and that he would not vote to impose the death penalty under any circumstances. (T. 883) When Petitioner's counsel examined further, Mr. Ingram testified that he was "nervous" and could not think of any circumstances under which he would impose the death penalty. (T. 885)

Mr. Ingram admitted that he was nervous and having difficulty understanding some of the questions. This Court insisted in Adams v. Texas that "nervousness . . . is [not] equivalent to an unwillingness or inability . . . to follow the court's instructions and obey [his oath] regardless of his feeling about the death penalty." 100 S.Ct. at 2528-2529.

Ingram's inability to conjure up circumstances under which he would impose the death penalty was scarcely the unmistakable assertion of unqualified opposition required by this Court to disquality a prospective juror for cause; he should not have been disqualified. In Adams v. Texas, the Court made clear that prospective jurors may not be excluded on any basis broader than that enunciated by the decision of this Court. 100 S. Ct. at 2528.

A fourth prospective juror Nancy Ann Moon was also improperly disqualified. She testified that she "guessed" her disapproval of the death penalty would influence her decision on guilt and that she would not automatically vote against a sentence of death "because it depends on what it is." (T. 166-167) When the prosecutor asked her specifically if she could obey the law as instructed and impose the death penalty if authorized, she said "yes." (T. 166-167) Since her ambivalence was accompanied by an unqualified commitment to doing her duty as a juror, she was not properly disqualified.

The constitutional basis of Witherspoon and Adams is that "a jury uncommonly willing to condemn a man to die", 391 U.S. at 521, falls "woefully short of that impartiality to which the petitioner [is] entitled under the Sixth and Fourteenth Amendments." 391 U.S. at 518. In this case, the magnitude of the error created by excusing these four jurors is enhanced by the overall lack of impartiality of the jurors who were selected. Petitioner was tried by a jury which included not only the

mother of a prosecution witness who testified that Petitioner threatened her life at gunpoint (T. 1153-1165) but also jurors who had admitted on voir dire to prejudice and opinions on Petitioner's guilt, and jurors who had known the victim and his family to varying degrees. The case was tried in a county of 5,000 people which had been the decedent's home all his life and in which Petitioner, being from another county, was unknown and an outsider.

Whether or not the local prejudice and actual juror partiality in this case reached a level of unfairness comprising constitutional error under Irvin v. Dowd, 366 U.S. 717 (1961) and Murphy v. Florida, 421 U.S. 794 (1975), those factors certainly highlight the importance of providing a fair cross-section of community feeling with respect to imposition of the death penalty. Witherspoon v. Illinois, 391 U.S. at 519.

In sum, none of these excluded jurors exhibited that fixed opposition to the death penalty which alone might have warranted their exclusion for cause. Indeed, Beverly Abbott, Janet Harben, Nancy Ann Moon and David Ingram were clearly willing to lay aside their personal feelings. Yet each of the four was excluded by the trial court, and the Supreme Court of Georgia on appeal held that "[t]he jurors' responses satisfied the test set forth in Witherspoon, supra, as reiterated in Lockett v. Ohio. . . ." Dick v. State, supra, 273 S.E.2d at 129. In light of the clear violations in this case, Petitioner respectfully submits that summary reversal of his death sentence (see Davis v. Georgia, supra) or vacation of his sentence with a remand for reconsideration in light of Adams v. Texas, supra, is warranted.

CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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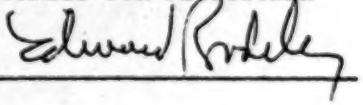
By 

Dated: February 23, 1981
New York, New York

APPENDIX A

has Eastern overhaul the Alaska Air Lines 727s. During the time that our aircraft were ever overhauled we flew Eastern 727s on our routes. They're equipped with a flight director system where the cost of the instruments for one pilot exceed the cost of a Cessna 310."

[1, 2] "The rules of law governing the degree of care owed by an operator of aircraft to his guest riding therein are the same as those governing the operator of a motor vehicle under similar circumstances, and in both cases the defendant operator is liable for injuries to his guest only in cases of gross negligence." *Sammons v. Webb*, 86 Ga.App. 382(12a), 71 S.E.2d 832 (1952); *C. & S. Nat. Bank v. Huguley*, 100 Ga.App. 75, 110 S.E.2d 63 (1959); Code Ann. § 11-107. Similarly the defenses of assumption of the risk and avoidance of consequences are available to a defendant pilot of aircraft. *Crandall v. Sammons*, 62 Ga.App. 1, 7 S.E.2d 575 (1940).

"In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone." Prosser, Law of Torts (4th Ed.) p. 440. "In by far the greatest number of cases, the consent to assume the risk has not been a matter of express agreement, but has been found to be implied from the conduct of the plaintiff under the circumstances." Prosser, supra, at 445; see Harper and James, Law of Torts, Vol. 2, Ch. XXI.

"Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection. Unlike assumption of risk, the defense does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff." Prosser, supra, at 416. "Closely allied to the doctrine of contributory negligence is the rule of 'avoidable consequences,' which denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff. Both rest upon the same fundamental policy of making recovery depend upon the plaintiff's proper care for the protection of his own interests, and both require of him only the standards of the reasonable man under the circumstances." Prosser, supra, at 422; see Harper and James, supra, at 1231.

[3] In the present case the plaintiff was a licensed pilot with 400 hours of flying time of four years duration. Although not licensed to fly instruments, he was familiar with VOR and the Fulton County Airport and had some instrument ground school instruction. During the flight here and the instrument approach when the plane crashed he was riding in the co-pilot's seat and assisting in the navigation of the plane. The evidence shows it was common knowledge that the Fulton County VOR was erratic and that a new ILS was being installed. There was also evidence that the airplane had "broken out" of the overcast and was on visual flight rules. Under these facts and the other circumstances of the case, we find the trial judge was authorized to charge the jury on assumption of the risk and avoidance of consequences.

Judgment reversed. Remanded to the Court of Appeals.

All the Justices concur, except JORDAN, P. J. and HILL, J., who dissent.

KEY NUMBER SYSTEM

DICK

v.

The STATE.

No. 36229.

Supreme Court of Georgia.

Argued July 14, 1960.

Decided Nov. 8, 1960.

Rehearing Denied Nov. 25, 1960.

Defendant was convicted in the Dawson Superior Court, Palmour, J., of armed

robbery and of murder, and he appealed. The Supreme Court, Clarke, J., held that: (1) failure to grant a change of venue by reason of pretrial publicity or local knowledge of crime was not error, notwithstanding claim that each prospective juror had heard something about case, where each juror who was not struck for prejudice expressly indicated that he or she could lay aside any opinion he or she had formed and render a sentence based solely on evidence; (2) determination in favor of admitting defendant's confession was not error despite claim that advice given defendant by his brother to confess was the result of investigator's conversation in which the brother was told to convince the defendant to confess; (3) conduct of trial court when, outside presence of jury, it questioned defendant as to presence of telephones in the sheriff's office was not a basis for concluding that trial court assisted the prosecution and improperly interfered with trial of case; and (4) sentence of death imposed on conviction of armed robbery and murder was not imposed under influence of passion, prejudice, or any arbitrary factor and was not unlawful.

Affirmed.

1. Criminal Law ⇐126(1)

Failure to grant a change of venue by reason of pretrial publicity or local knowledge of crime was not error, notwithstanding claim that each prospective juror had heard something about case, where each juror who was not struck for prejudice expressly indicated that he or she could lay aside any opinion he or she had formed and render a sentence based solely on evidence.

2. Jury ⇐33(2)

That victim was well known in community was not in itself indicative that jury drawn from that community was death prone.

3. Jury ⇐97(1)

Low percentage of veniremen excused for prejudice, approximately ten percent, strongly corroborated expression of impartiality by other jurors who were not excused for prejudice.

4. Criminal Law ⇐121

A motion for change of venue lies within the sound discretion of the trial judge.

5. Jury ⇐108

Rule in *Witherspoon* did not establish that certain jurors were improperly excused in case where each prospective juror on voir dire responded that he or she could not impose death penalty under any set of circumstances.

6. Criminal Law ⇐520(2)

A confession otherwise admissible is not inadmissible because it was prompted by advice of a relative of the defendant.

7. Criminal Law ⇐517.2(2)

Ten-hour lapse between time of waiver and actual confession at which time previous warnings were reiterated did not render confession inadmissible.

8. Criminal Law ⇐520(2)

Determination in favor of admitting defendant's confession was not error despite claim that advice given defendant by his brother to confess was the result of investigator's conversation in which the brother was told to convince the defendant to confess.

9. Criminal Law ⇐537

Tangible evidence obtained as a result of defendant's confession was not improperly admitted given fact that confession itself was freely and voluntarily given.

10. Homicide ⇐250
Robbery ⇐24.1(3)

Evidence overwhelmingly supported a finding of guilt beyond reasonable doubt of crimes of armed robbery and murder.

11. Criminal Law ⇐656(2)

Conduct of trial court when, outside presence of jury, it questioned defendant as to presence of telephones in the sheriff's office was not a basis for concluding that trial court assisted the prosecution and improperly interfered with trial of case.

12. Criminal Law ⇐629

Trial court did not err in allowing defendant's confession in evidence and did not, by doing so, allow defendant to become a witness against himself notwithstanding that defendant was not listed as a witness on list of witnesses furnished to defense counsel. Code, § 27-1403.

13. Jury ⇐131(13)

That daughter and son of victim were allowed to remain in courtroom during voir dire and assist prosecution was not such as to establish that order granting a sequestered voir dire was violated in absence of a showing of prejudice.

14. Indictment and Information ⇐191(4)

Armed robbery charged in case was not, as a matter of law or a matter of fact, a lesser included offense of malice murder notwithstanding that, under evidence in case, defendant was the triggerman and actively participated in the armed robbery including the reception of some of the proceeds.

15. Criminal Law ⇐774

Failure to grant requested charge that "intoxication or drunkenness is not a defense to a crime, however; if prolonged drunkenness causes a permanent mania or insanity, then an insanity defense may be used" was not error in that request was not a complete statement of law, no special or general plea of insanity was filed, and trial court adequately charged jury as to voluntary intoxication in any event.

16. Criminal Law ⇐790

Requests to charge that, if jury could not reach a verdict, trial court would impose a life sentence and that law presumed that a life sentence meant that defendant would spend remainder of his natural life in penitentiary were not clearly principles of law to be given in a charge to a jury and were properly refused. Code, § 27-2534.1 et seq.

17. Criminal Law ⇐438(7)

Photographs which are relevant and which are material to issues in case need not be excluded on grounds that they would inflame minds of jurors or are corroborative or cumulative of other grounds.

18. Criminal Law ⇐438(4, 5)

Photographs, each of which depicted location of wound, crime scene, and way in which victim had been robbed, were material and admissible.

19. Criminal Law ⇐473, 476

Testimony of physician as to cause of death and location of wound was relevant evidence in that location of wound was a crucial part of state's case and, as such, could not be kept from jury by admission of fact or waiver of requirement of proof.

20. Criminal Law ⇐828

A charge on lesser included offense of voluntary manslaughter or felony-murder was not required to be given in absence of a written request.

21. Criminal Law ⇐444

A proper foundation for use of tape recordings of defendant's confession was laid given evidence in record that mechanical transcription device was capable of taking testimony, that operator of device was competent to operate it, and that no changes, additions, or deletions had been made on tape.

22. Criminal Law ⇐1119(4)

Record did not support defendant's contention that victim's son was placed on the witness stand by the state for the sole purpose of prejudicing the defendant.

23. Criminal Law ⇐713

Trial court did not err in failing to grant a mistrial as a result of improper actions, remarks and statements of district attorney during trial and in his closing argument.

24. Criminal Law ⇐708(4)

Trial court did not err in allowing prosecution on cross-examination to go into prejudicial aspects of prior conviction of defendant in that prosecutor's questioning sought to show that defendant used same defense in statutory rape conviction as he was presently attempting to assert and each

party had a right to a thorough and sifting cross-examination of opposing witness. Code, § 38-1705.

25. Criminal Law ⇐986.2(4)

Trial court did not err in admitting indictment of a previous felony committed by defendant at presentence hearing where defendant brought out conviction on cross-examination during trial of case and admitted that he had committed crime.

26. Homicide ⇐354

Sentence of death imposed on conviction of armed robbery and murder was not imposed under influence of passion, prejudice, or any arbitrary factor and was not unlawful. Code, §§ 27-2534.1(b)(2), 27-2537(c)(1-3).

27. Homicide ⇐354

Allowing jury to reach a verdict of a death sentence was not error on ground that no new evidence was introduced by state during sentence phase of trial. Code, §§ 27-2534.1(b)(2), 27-2537(c)(1-3).

28. Homicide ⇐354

Trial court's charge during sentencing phase of trial was not unjustly weighted toward the state and death penalty notwithstanding claim that undue weight and emphasis was placed on aggravating circumstances and too little on mitigating circumstances. Code, §§ 27-2534.1(b)(2), 27-2537(c)(1-3).

29. Criminal Law ⇐1208(2)

That codefendant was sentenced to life imprisonment, whereas defendant was sentenced to death, did not establish that defendant's sentence was disproportionate considering crime. Code, §§ 27-2534.1(b)(2), 27-2537(c)(1-3).

J. Max Davis, Decatur, for appellant.

Jeff C. Wayne, Dist. Atty., Thomas M. Cole, Asst. Dist. Atty., Arthur K. Bolton, Atty. Gen., William B. Hill, Asst. Atty. Gen., for appellee.

CLARKE, Justice.

The appellant, Dennis Dick, was convicted by a jury in the Superior Court of Dawson County for armed robbery and the murder of O. C. (Red) Rider. He was sentenced to death for murder and to life imprisonment for armed robbery. This case is here on direct appeal and for mandatory review of the death sentence.

Summary of Facts

From the evidence presented at trial, the jury was authorized to find the following facts:

The appellant was a resident of Hall County and was familiar with the business establishment operated by the victim, O. C. (Red) Rider, in Dawson County. The victim had acquired a reputation as a bootlegger and was well known throughout Dawson County. Together with Bill Webster and Christopher Hoerner, appellant had been drinking, and about 9:00 p. m. on June 2, 1979, the three companions left in a car belonging to Hoerner for the purpose of getting more beer. As they traveled toward the victim's place of business, the three men formulated a plan to rob the victim. The familiarity of appellant with the victim's place of business was illustrated by the fact that he directed the driver to the location.

Upon arriving at the trailer in which the victim operated his business, Hoerner gave a pistol to appellant, and appellant and Webster entered the trailer. Finding the victim to be alone, the two men bought a six-pack of beer and paid for it. As the victim turned around, appellant pulled the pistol and told him to freeze and give him his money.

Appellant in his statement admitted shooting the victim one time but told authorities that he did so only when the unarmed victim advanced upon him after refusing to turn over the money. Forensic evidence, however, established that the victim was shot behind the left ear with a 38 caliber pistol. There was also evidence of bruises and abrasions on the victim's forehead and left cheek. When the victim was

found, he was lying face down in a hallway of the trailer and was not near the counter where the beer was sold. In addition, a bullet hole was found in the floor next to the victim's head bearing out testimony of witnesses that two shots and not one had been heard. The victim's pockets were turned inside out, and the telephone was found torn from the wall.

While the robbery was still in progress, John Bolton, Doyle Martin and Teresa Grant drove up to the trailer. As they stopped, Christopher Hoerner, who was acting as a lookout, stuck a shotgun out the window of his car and told the three not to move. When Webster and appellant ran out of the victim's trailer, appellant ordered the three out of the car at gunpoint and told them to lie on the ground. The two robbers then got back into their car to flee but ran the car into a ditch. At this point, appellant returned and told the three persons lying on the ground to run into the woods and not look back or he would kill them. Having chased away the witnesses, appellant attempted to crank their car but was unable to do so. The three robbers were finally able to flee, however, when Hoerner and Webster finally freed their car from the ditch. At about this time, Terry Allen arrived upon the scene and saw someone running across the yard to the car used by the robbers. He went inside the trailer and discovered the body of the victim and contacted the authorities. Appellant and his co-defendants abandoned the car in which they were fleeing after it broke down. Local law enforcement authorities traced the car to its owner through its tag which had been torn off when it went into the ditch. This information subsequently led authorities to the appellant, and he was arrested the next day after he had walked most of the way to Hoerner's trailer from where the car was abandoned. The other two co-defendants were subsequently arrested also. A metal money box was recovered, but the murder weapon was never found.

Enumerations of Error

(1) The appellant in his first enumeration of error complains that the trial court erred in failing to grant a change of venue. The appellant argues that because of pre-trial publicity and local knowledge of the crime, it was impossible to obtain an impartial jury.

At the outset, we note that the record contains no evidence of prejudicial pre-trial publicity. Appellant concedes that there is no evidence of a "total inundation of the judicial process by the media." *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

[1] Rather, appellant relies upon the fact that each prospective juror had heard something about the case. However, each prospective juror not struck for prejudice expressly indicated that he or she could lay aside any opinion he or she had formed and render a sentence based solely upon the evidence. *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979); *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1960).

[2] The victim was well known in the community but this alone does not indicate that the jury drawn from that community is death prone. *Collier v. State*, supra.

[3] The record in this case shows that 120 prospective jurors were examined. The appellant was allowed an additional 10 strikes and the state an additional 5. The jurors were examined outside the presence of each other. *See Collier v. State*, supra. Of these jurors, 49 were excluded for normal cause (prohibited degree of relationship to the victim or prosecutor, unalterable opposition to the death penalty, etc.). Thirteen were excused for prejudice or a fixed opinion as to guilt or innocence. This low percentage of veniremen excused for prejudice (approximately 10%) strongly corroborates the expressions of impartiality by the other jurors who were not excused for prejudice. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1974); *Tucker v. State*, supra (5% dismissal rate corroborates

absence of prejudicial bias); *Collier v. State*, supra (20% dismissal rate corroborates absence of prejudicial bias); *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976) (46% dismissal rate corroborates absence of prejudicial bias); *Butler v. State*, 231 Ga. 276, 201 S.E.2d 448 (1973) cert. den., 420 U.S. 907, 95 S.Ct. 825, 42 L.Ed.2d 836 (1974) (36% dismissal rate corroborates absence of prejudicial community bias); cf. *Irvin v. Dowd*, supra (62% dismissal rate corroborates actual juror partiality).

Furthermore, the appellant failed to exhaust all of his peremptory challenges. *Coleman v. State*, supra; *Davis v. State*, 241 Ga. 376, 247 S.E.2d 45 (1978). We also note that the state presented an overpowering and overwhelming mass of evidence, on the question of appellant's guilt. The appellant did not dispute such evidence and in fact admitted under oath that he was the triggerman. Under this evidence, no other verdict could have been returned by a rational trier of fact. See *Coleman v. State*, supra; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[4] A motion for change of venue lies within the sound discretion of the trial judge. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Allen v. State*, 235 Ga. 709, 712, 221 S.E.2d 406 (1975); *Coleman v. State*, supra. We find no abuse of discretion here.

[5] Appellant also asserts that certain jurors were improperly excused in violation of the rule of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). However, each such prospective juror upon voir dire responded that he or she could not impose the death penalty under any set of circumstances. The jurors' responses satisfied the test set forth in *Witherspoon*, supra, as reiterated in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Harris v. Hopper*, 243 Ga. 244, 253 S.E.2d 707 (1979); *Collier v. State*, supra; *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

(2) In his second enumeration of error, the appellant asserts that his confession was not freely and voluntarily given.

Immediately after his arrest, the appellant was taken to the sheriff's office where he signed a waiver of rights. However, he made no statement at that time. Some ten hours later, in the presence of his brother, and after conferring with his brother, he gave local authorities a complete confession. The trial court, after a *Jackson v. Denno* hearing, admitted the confession, holding it to have been made freely and voluntarily. Appellant argues that but for the urging of his brother with whom he consulted, he would not have confessed. The appellant's brother told him that if he did not confess, he would get the death penalty.

[6] A confession otherwise admissible is not inadmissible because it was prompted by advice of a relative of the defendant. *Shavers v. State*, 244 Ga. 491, 260 S.E.2d 883 (1979).[1]

The appellant further argues that the initial waiver of rights signed the morning of his arrest was not a knowing waiver in that he was tired, hungry, withdrawing from alcohol and emotionally upset at that time.

[7] The state introduced evidence that appellant was not drunk nor in such a condition so to be unable to understand the consequences of his action. Moreover, the statement was not taken immediately after the arrest but some ten hours later, after appellant consulted with his brother and was again advised of his rights. It is clear from the taped confession that the confession was voluntary. The ten-hour lapse between the time of the waiver and the actual confession at which time the previous warnings were reiterated did not render the confession inadmissible. *Stapleton v. State*, 235 Ga. 513, 220 S.E.2d 269 (1975).

[8] Appellant also argues that his brother's advice to confess was the result of an investigator's conversation in which his

1. Whether a prisoner is allowed to see relatives is significant in a determination of voluntari-

ness. See *Jacob v. Estelle*, 622 F.2d 829 (5th Cir. 1980).

brother was told to convince appellant to confess or he would face a death penalty. The investigator testified that he never had such a conversation with the appellant's brother and that appellant did not ask to consult with an attorney. This conflict in the evidence was resolved by the trial court in favor of admissibility, and we find no error in the trial court's determination. *Johnson v. State*, 233 Ga. 58, 209 S.E.2d 629 (1974); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Burney v. State*, 244 Ga. 33, 257 S.E.2d 543 (1979); *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980).

[9] We also note in this regard that on direct examination during the guilt-innocence phase of the trial, the defendant reiterated his confession and admitted his guilt. Therefore, *L. C. v. State of Ga.*, 151 Ga.App. 307, 259 S.E.2d 702 (1979), cited by appellant, is inapplicable. This enumeration of error is without merit. Appellant's confession being freely and voluntarily given, appellant's contention that tangible evidence obtained as a result of the confession was improperly admitted is similarly without merit.

[10] (3) In his third and eleventh enumerations of error, the appellant argues general grounds. We find that the evidence in this case overwhelmingly supports a finding of the guilt of the accused by a rational trier of fact beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, supra. These enumerations are without merit.

[11] (4) During the *Jackson v. Denno* hearing, outside the presence of the jury, the trial judge questioned the defendant as to the presence of telephones in the sheriff's office. Appellant contends that the trial court thereby assisted the prosecution and improperly interfered with the trial of the case. Similarly, appellant complains that at other times during the trial, the trial judge improperly admonished defense counsel. Enumerations of error 4 and 14 are without merit. *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980); *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 168 (1974); *Wilson v. State*, 229 Ga. 224, 190 S.E.2d 78 (1972).

[12] (5) In his fifth enumeration of error, the appellant contends that the trial court erred in allowing the appellant's confession in evidence in that by doing so, the appellant became a witness against himself, and the appellant was not listed as a witness on the list of witnesses furnished to the appellant. The appellant cites no authority other than the statute itself. Code Ann. § 27-1403. The purpose of the statute is to " 'insure that an accused is confronted at trial with testimony against him from witnesses whom he has not had an opportunity to interview prior to trial.' " *Herring v. State*, 238 Ga. 288, 289, 232 S.E.2d 826 (1977). This enumeration of error is without merit.

[13] (6) During voir dire, over objection, the daughter and son of the victim were allowed to remain in the courtroom and assist the prosecution. Appellant alleges error and argues that the court's own order granting a sequestered voir dire was thereby violated. However, the court's order by its terms allowed additional persons to remain during voir dire as the court deemed necessary. The control over such matters necessarily rests within the sound discretion of the trial court and unless that discretion is abused, it will not be controlled by the appellate courts. *White v. State*, 230 Ga. 327, 196 S.E.2d 849 (1973). In this case, contrary to appellant's position that the court's action prejudiced him, in at least one instance, the daughter of the victim was able to inform the court as to persons on the jury who were related to the victim within the prohibited degree. We note that this is a problem in jury selection in some rural counties. A review of the voir dire (see Division 1, supra) disclosed very frank answers regarding prejudice by the prospective jurors. No indication appears on the record nor does appellant demonstrate any prejudice due to the presence of the members of the family during voir dire. Enumeration of Error 6 has no merit.

[14] (7) Under the evidence in this case, appellant was the triggerman and actively

participated in the armed robbery including receiving some of the proceeds. There is no merit in the contention that in this case the armed robbery was, as a matter of law or a matter of fact, a lesser included offense of the malice murder. See *Hoerner v. State*, 246 Ga. 374, 271 S.E.2d 458 (1980); *Bell v. State*, 239 Ga. 146, 236 S.E.2d 47 (1977); *Barrow v. State*, 235 Ga. 635, 221 S.E.2d 416 (1975).

(8) In his eighth enumeration of error, appellant contends that the trial court erred in failing to give defendant's request to charge number two.

Defendant's request to charge was as follows: "... generally intoxication or drunkenness is not a defense to a crime, however, if prolonged drunkenness causes a permanent mania or insanity, then an insanity defense may be used."

No special or general plea of insanity was filed; the defendant instead entered a general plea of not guilty. See *Taylor v. State*, 245 Ga. 501, 265 S.E.2d 803 (1980); *Lewis v. State*, 239 Ga. 732, 238 S.E.2d 892 (1977); *Ross v. State*, 217 Ga. 569, 124 S.E.2d 280 (1962).

[15] The request is not a complete statement of law, and the trial court did not err in failing to charge the request. *Peek v. State*, 155 Ga. 49, 116 S.E. 629 (1922); *Strickland v. State*, 137 Ga. 115, 72 S.E. 922 (1911); *Ross v. State*, supra.

The trial court adequately charged the jury as to voluntary intoxication. Testimony that the appellant began drinking at an early age and sometimes did not remember what happened does not raise an issue of insanity. See *Lewis v. State*, supra.

Appellant further argues that the court erred in failing to charge his requests to charge in the sentencing phase of the trial. We find no error. Mitigating circumstances are not required to be singled out. *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979). The trial court adequately charged as to *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1978) and *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1978). Failure to instruct in the exact language requested is not error. *Pollard v. State*, 236 Ga. 587, 224 S.E.2d 420 (1976). Appellant's sixth request to charge, to wit: "Aggravating circumstances must be outrageously and wantonly vile in that they involve torture to the victim and depravity of mind on the part of the defendant" is an incorrect statement of law, and the court did not err in refusing to so charge. Code Ann. § 27-2534.1 et seq. *Hance v. State*, supra.

[16] Appellant's requests to charge that if the jury could not reach a verdict, the trial court would impose a life sentence and that the law presumes a life sentence means that the defendant shall spend the remainder of his natural life in the penitentiary are clearly not principles of law to be given in a charge to a jury and were properly refused.

(9) The appellant in his ninth enumeration of error contends that the trial court erred in admitting state exhibits 2 through 4, 8, 10, 13, 14, 16 through 18, and 20 through 28 in that they are fruits of the poison tree, i.e. a product of an illegal confession. The confession having been determined to be properly admitted, appellant's argument is without merit. See Division 2, supra. Appellant further contends that some of the state exhibits were erroneously admitted over proper objection. Exhibits 2 and 3, photographs of the victim, were admitted over objection. The remainder of the exhibits were admitted without objection.

[17, 18] It is well settled that photographs, which are relevant and material to issues in the case, need not be excluded on the grounds that they would inflame the minds of the jurors or are corroborative or cumulative of other grounds. *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1979); *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979). Each photograph depicted the location of the wound, the crime scene and the way in which the victim had been robbed. As such, photographs were material, and the trial court did not err in admitting them into evidence.

[19] (10) In his tenth and seventeenth enumerations of error, the appellant asserts that the trial court erred in admitting the testimony of Dr. Whitcomb and other forensic evidence over objection. Appellant argues that since the cause of death had been stipulated, the testimony of Dr. Whitcomb, who had examined the body of the victim, was prejudicial and inflamed the minds of the jury. The evidence complained of was relevant testimony as to cause of death and the location of the wound, the location of the wound being a crucial part of the state's case. The trial court did not err in admitting the testimony. Relevant evidence cannot be kept from the jury by admission of the fact or waiver of the requirement of proof. *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980).

[20] (11) In his eleventh enumeration of error, appellant contends that the trial court erred in not instructing the jury as to voluntary manslaughter of felony murder. The trial judge charged the jury as to the crime specified in the indictment, malice murder. Since there is no requirement that a charge on a lesser included offense be given in the absence of a written request, this enumeration is not meritorious. *Lamb v. State*, 245 Ga. 104, 263 S.E.2d 143 (1980); *Thomas v. State*, 243 Ga. 217, 253 S.E.2d 190 (1979); *State v. Stonaker*, 236 Ga. 1, 222 S.E.2d 354 (1976).

(12) Appellant's enumerations of error 12 and 20 through 22 deal with sentence and will be considered in the sentence review portion of the opinion.

[21] (13) In the appellant's thirteenth and fourteenth enumerations of error, he contends that the tape recordings of his confession were improperly admitted into evidence. When the state sought to introduce appellant's taped confession, defense counsel objected on the ground that the proper foundation had not been laid. The trial court instructed counsel to perfect his objection and state what the proper foundation should be. Counsel did not comply. Objection on the ground of a lack of proper foundation without stating what the proper foundation should be is insufficient and presents nothing for consideration on appeal. *Newman v. State*, 239 Ga. 329, 236 S.E.2d 673 (1977); *Dillard v. State*, 128 Ga. App. 747, 197 S.E.2d 924 (1973). However, pretermitting waiver, this court has examined the record and concludes that the proper foundation for the use of the tapes was laid. *Brooks v. State*, 141 Ga.App. 725, 234 S.E.2d 541 (1977); *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); *Solomon, Inc. v. Edgar*, 92 Ga.App. 207, 88 S.E.2d 167 (1955). The record in this case affirmatively shows that the mechanical transcription device was capable of taking testimony, that the operator of the device was competent to operate it, and that no changes, additions, or deletions had been made to the tape. Furthermore, the manner of preservation was shown; the speakers were identified, and the testimony elicited was freely and voluntarily made without duress. See Division 2 herein. In addition, appellant argues that portions of the tape were improper and were not part of the appellant's statement but prejudicial assumptions of the interrogator.

During the interrogation, the officers asked appellant if he had struck the victim. Appellant denied striking the victim. Forensic evidence established bruises on the victim's face. The question was relevant to the inquiry. No prejudice having been shown, this argument is without merit.

[22] (14) The state called the victim's son as a witness. He had been the second person to see the victim after the murder. In addition, the son worked in the victim's place of business and had knowledge of the amount of receipts. During direct examination, the witness became emotional and began to weep. A recess was taken, and the witness was able to compose himself. The defense counsel moved for a mistrial on the grounds that the state intentionally caused such an emotional outburst and that the defendant was prejudiced thereby. The motion for mistrial was overruled, and we find no error. The emotional outburst in this case consisted of the witness crying. There is no evidence in the record that the witness became hysterical or made any

prejudicial comments or threats in the courtroom. The record simply does not support appellant's contention that this witness was placed on the witness stand by the state for the sole purpose of prejudicing the defendant. Furthermore, such emotions are reasonably expected by one who is a close relative of a murder victim. The trial court did not abuse its discretion in failing to grant appellant's motion for mistrial. "Many, if not most, trials by jury involve some degree of emotion by at least one party or the other. It would be unreasonable to expect that all emotions be completely frozen during a trial by jury when such effective bridle on emotions cannot be sustained elsewhere." *Associated Distributors, Inc., v. Strozier*, 144 Ga.App. 205, 206, 240 S.E.2d 761 (1977). Demonstrations and outbursts which occur during the course of a trial are matters within the trial court's discretion unless a new trial is necessary to insure a fair trial. *Sheppard v. State*, 235 Ga. 89, 218 S.E.2d 830 (1975). Here the trial court stopped the trial and allowed the witness to compose himself, and it is unlikely that the witness' crying without more prejudiced appellant's defense. Compare *Futch v. State*, 151 Ga.App. 519, 260 S.E.2d 520 (1979) with *Price v. State*, 149 Ga.App. 397, 254 S.E.2d 512 (1979).

[23] (15) In his eighteenth enumeration of error, the appellant asserts that the trial court erred in failing to grant a mistrial as a result of improper actions, remarks and statements of the district attorney during the trial and in his closing argument. In one instance, the district attorney in cross examining the defendant's brother remarked to the witness, "I wouldn't think they would electrocute me, if I wasn't entitled to it." The defense counsel moved for a mistrial on the grounds that the district attorney was speaking with the witness and not questioning him. The motion was denied, but corrective instructions were given. The decision of whether to grant a motion for mistrial lies within the sound discretion of the trial judge, and his judgment will not be disturbed on appeal absent a showing of abuse of discretion. *Sims v. State*, 243 Ga. 83, 252 S.E.2d 501 (1979); *Patterson v. State*, 239 Ga. 409, 238 S.E.2d 2 (1977). Under the circumstance of this case, we find no abuse of discretion.

[24] (16) On direct examination, appellant admitted a prior conviction for statutory rape. He went into the particulars of that offense in an obvious effort to show the jury he had not been convicted of a crime of violence. Appellant contends that the trial court erred in allowing the prosecution on cross examination to go into prejudicial aspects of the prior conviction of the defendant. We do not agree. The prosecutor's questioning sought to show that the defendant used the same defense in the statutory rape conviction as he now was attempting to assert. Each party has the right to a thorough and sifting cross examination of the opposing witness. Ga.Code Ann. § 38-1705. The trial court has the discretion to determine the scope of cross examination, and in the absence of abuse of that discretion, the action of the trial judge will not be disturbed. *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979). Enumeration of Error 16 is without merit.

[25] (17) In his last enumeration of error, appellant asserts that the trial court erred in admitting the indictment of a previous felony committed by the defendant at the presentence hearing since there was no showing that the defendant was represented by counsel or that he intelligently waived his right to counsel. However, the defendant on direct examination during the trial of the case brought out the conviction of the previous felony and admitted that he had committed that crime. Furthermore, the indictment for the prior felony was admitted without objection and shows upon its face that the appellant was represented by counsel. This enumeration is wholly without merit.

Sentence Review

[26] As required by Georgia Law 1973, p. 159, et seq. [Code Ann. § 27-2537(c)(1-3)], we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, the

evidence concerning the crime, and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any arbitrary factor. See Division 1 herein.

The jury found the following aggravating circumstance: The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery. Code Ann. § 27-2534.1(b)(2).

During the guilt/innocence phase of the trial, the jury found the defendant guilty of armed robbery. We find the evidence factually substantiates and supports the finding of the statutory aggravating circumstance, the finding of guilt, and sentence of death by a rational trier of fact beyond a reasonable doubt. *Jackson v. Virginia*, *supra*.

[27] (18) The appellant contends in Enumeration 20 that the jury should not have been allowed to reach a verdict of a death sentence as no new evidence was introduced by the state during the sentence phase of the trial. However, the state necessarily under the facts of this case introduced during the guilt/innocence phase of the trial all of the evidence required to support the finding of the aggravating circumstance returned by the jury. This enumeration of error is without merit. See *Spivey v. State*, 241 Ga. 477, 246 S.E.2d 288 (1978).

[28] (19) In his twenty-second enumeration of error, the appellant contends that the trial court's charge during the sentencing phase of the trial was unjustly weighted toward the state and the death penalty, in that undue weight and emphasis was placed on aggravating circumstances and too little on mitigating circumstances. Appellant argues that the trial court's charging of the three aggravating circumstances upon which the state sought the death penalty was prejudicial. We do not agree. The charge of the court complied with the standards set forth in *Spivey v. State*, supra; *Fleming v. State*, supra, and *Hawes v. State*, supra. See *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979) and *Fleming v. State*, 243 Ga. 120, 252 S.E.2d 609 (1979).

[29] Appellant's co-defendant, Christopher Hoerner, was sentenced to life imprisonment. See *Hoerner v. State*, supra. The question thus presented is whether appellant's sentence is disproportionate considering the crime and the defendant in light of the lesser sentence imposed on a co-defendant.

There is no simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence. *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146, supra; *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729, supra. Each case is evaluated on its own unique factual circumstance.

As in *McClesky v. State*, supra, we find material distinctions between appellant's and the case of the other co-defendant. First, the appellant was the actual perpetrator of the murder, whereas the other defendant was not in the immediate area of the killing but was stationed outside as a lookout. Juries under similar circumstances have sentenced triggermen to death while the same penalty has not been imposed on co-defendants. These cases have been affirmed by this court. *Goins v. State*, 245 Ga. 62, 262 S.E.2d 818 (1980); *Ross v. State*, 233 Ga. 361, 211 S.E.2d 356 (1974); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Bowden v. State*, 239 Ga. 821, 238 S.E.2d 905 (1977).

Contrary to appellant's position, this case is not controlled by the recent United States Supreme Court decision of *Godfrey v. Georgia*, 446 U.S. —, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In *Godfrey* the court was concerned with a sentence of death resting exclusively on Code Ann. § 27-2534.1(b)(7). The other statutory aggravating circumstances are more "specific and measurable." *Godfrey v. Georgia*, supra.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which

a death or life sentence was imposed. The evidence shows that this was the intentional killing of an unarmed victim of an armed robbery. It was a coldblooded killing perpetrated solely for the purpose of monetary gain. We find that the following similar cases listed in the Appendix support affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the sentence imposed in similar cases considering the crime and the defendant.

Judgment affirmed.

All the Justices concur.

APPENDIX

Lingo v. State, 226 Ga. 496, 175 S.E.2d 657 (1970); *Johnson v. State*, 226 Ga. 511, 175 S.E.2d 840 (1970); *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971); *Hunter v. State*, 231 Ga. 494, 202 S.E.2d 441 (1973); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365 (1975); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Tamplin v. State*, 235 Ga. 20, 218 S.E.2d 779 (1975); *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975); *Barrow v. State*, 235 Ga. 635, 221 S.E.2d 416 (1975); *Brown v. State*, 235 Ga. 644, 220 S.E.2d 922 (1975); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 90 (1979); *Hamilton v. State*, 244 Ga. 145, 259 S.E.2d 81 (1979); *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979); *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980).

HAWN

v.

CHASTAIN et al.

No. 36492.

Supreme Court of Georgia.

Argued Sept. 8, 1980.

Decided Nov. 5, 1980.

Rehearing Denied Nov. 25, 1980.

The Cobb Superior Court, Williford, Senior Judge, dismissed appeal from county zoning board, and application for discretionary appeal was granted. The Court of Appeals, Parley, J., 154 Ga.App. 609, 269 S.E.2d 50, affirmed. Petition for certiorari was granted and the Supreme Court, Hill, J., held that: (1) section of Civil Practice Act governing involuntary dismissal of action did not authorize dismissal of appeal to Superior Court for failure to comply with order requiring supersedeas bond where General Assembly had not authorized dismissal as sanction for such failure, but had merely authorized requiring of supersedeas bond, and (2) sanction for failure to post supersedeas bond is that appellee may proceed to enforce, or in accordance with, judgment, subject to outcome of appeal, and failure does not authorize dismissal of appeal to Superior Court even where such court finds failure is willful.

Judgment reversed.

1. **Appeal and Error ⇐469(1), 780(1)**

Section of Civil Practice Act governing involuntary dismissal of action does not authorize dismissal of an appeal to superior court for failure to comply with order requiring supersedeas bond where General Assembly has not authorized dismissal as sanction for such failure, but merely authorized requiring of bond. Code, §§ 6-105(b), 6-1002, 81A-141(b).

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

DENNIS DICK,

Petitioner,

-v.-

THE STATE OF GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Dennis Dick, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Mr. Dick's affidavit in support of this motion is annexed.

Edward Brodsky
Spengler Carlson Gubar & Brodsky
280 Park Avenue
New York, New York 10017

Attorney for Petitioner

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DENNIS DICK,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DENNIS DICK, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No ✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 5-77 - $700.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No ✓

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

   a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dennis Dick

DENNIS DICK

STATE OF GEORGIA
COUNTY OF Dawson

SUBSCRIBED AND SWORN TO
before me this the 19 day of Jan, 1981.

Jeri Springfield

My Commission expires:

Notary Public, Georgia State at Large
My Commission Expires June 24, 1983

CERTIFICATE OF SERVICE

I hereby certify that I have served the annexed Petition for Writ of Certiorari and Motion to proceed in forma pauperis on appellee by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Hon. William B. Hill, Jr.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Hon. Jeff C. Wayne
P.O. Box 1690
Gainesville, Georgia 30503

All parties required to be served have been served.

Done this 23rd day of February, 1981.

Edward Brodsky

EDWARD BRODSKY
Attorney for Appellant

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-6231

ORIGINAL COPY

DENNIS DICK,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Did the Supreme Court of Georgia properly conclude on direct appeal of Petitioner's convictions and sentences that Petitioner's confession was freely and voluntarily made?

2.

Did the Supreme Court of Georgia properly conclude that the trial court did not err by not charging sua sponte the law of felony murder and voluntary manslaughter absent a timely request to charge same by Petitioner?

3.

Did the Supreme Court of Georgia correctly conclude that none of the prospective jurors were improperly excluded under the standard set forth in Witherspoon v. Illinois, 391 U.S. 510 (1967)?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-6321

DENNIS DICK,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

(i)

Petitioner seeks to have this Court review the decision of the Supreme Court of Georgia in Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980), rendered on November 5, 1980, affirming Petitioner's convictions for murder and armed robbery.[1/] Sentences of death and life imprisonment were respectively imposed.

1/ A copy of the decision of the Supreme Court of Georgia is attached hereto as Respondent's Exhibit A.

Petitioner's motion for a rehearing was denied on November 25, 1980. From the denial of the aforementioned motion, Petitioner has filed this instant petition for a writ of certiorari to be directed to the Supreme Court of Georgia.

STATEMENT OF FACTS

About midnight on June 2, 1979, the body of O. C. (Red) Rider was discovered in his trailer by two men who had come there to purchase cigarettes. (T. 1081-1082, 1084, 1103). Earlier that same evening Teresa Grant, John Bolton, and Doyle Martin had driven to the victim's trailer to purchase beer. (T. 1154, 1166). Grant and Bolton testified that upon their arrival they saw a man in a parked car outside the trailer who, from his car window, pointed a shotgun at them and told them not to move or they would get hurt. (T. 1155-1156, 1166, 1168). Two men then emerged from the trailer, one of whom was identified by Bolton as Petitioner. (T. 1156, 1168-1169). Petitioner, who had a pistol, told Grant, Bolton, and Martin to get out of their car and to lie down on the ground. (T. 1157, 1169). The three did as they were directed. (T. 1157, 1169).

Petitioner and his cohorts then drove a short distance in an attempted escape, but according to Bolton the car in which the Petitioner was riding got stuck in a ditch. (T. 1170-1171). Petitioner got out of the disabled car, returned to Bolton's car, and unsuccessfully tried to start it. (T. 1172). Petitioner then ordered Grant, Bolton, and Martin to run into the woods and told them he would shoot them if they looked back. (T. 1159, 1172). The three ran into the woods as directed by Petitioner. (T. 1160, 1173).

Investigator Russell Matthews of the Dawson County Sheriff's Department, testified that the victim was found lying on the floor in the hall of the trailer. (T. 1212-1213). The victim's pockets had been pulled inside out and there was loose change scattered near the body. (T. 115, 1119, 1214). A bullet hole was discovered in the floor near the victim. (T. 1116-1117). Tire tracks and ruts were found in a culvert near the trailer. (T. 1218). An auto license plate was also found nearby. (T. 1219, 1322). A check on the license plate, according to the testimony of Sheriff John Davis, revealed the owner of the automobile to be Christopher Hoerner, one of Petitioner's co-indictees. (T. 1310-1311). This information lead police to Hoerner's trailer where Petitioner was apprehended and arrested several hours after the murder. (T. 1220-1222, 1312-1314).

The car which Petitioner and his cohorts had driven from the scene of the murder was later found without its license plate abandoned on a dirt road. (T. 1266-1267). Also found in the wooded area near the car were a Remington .38 cartridge case, a Winchester cartridge case, and a metal tackle box. (T. 1136-1137, 1271, 1274). The victim's son testified that a metal box in which his father had approximately $150.00 was missing from the trailer. (T. 1193-1194, 1197).

An autopsy performed by Warren Tillman of the Georgia State Crime Laboratory revealed that the victim had abrasions on the face and a gunshot entry wound behind the left ear. (T. 1124-1125). Tillman stated that a .38 caliber bullet recovered from the right cheek area had traveled through the brain stem from its point of entry behind the left ear. (T. 1125). The gunshot wound to the head was the cause of death. (T. 1126, 1187-1188).

Dr. David Whitcomb, who examined the victim immediately following the discovery of the body, testified that the victim had been shot either from the side or from behind. (T. 1189).

Tillman, a microanalyst, further testified that the bullet hole discovered in the floor was consistent with one that would have been made by a .38 caliber projectile. (T. 1130). Tillman also testified that the Remington and Winchester cartridge cases found by police had been fired from the same weapon, and that the bullet recovered from the victim was of the same type ammunition used in the Remington and Winchester casings. (T. 1142, 1144). No weapon was ever found by police although a search was undertaken. (T. 1282, 1324).

Following Petitioner's arrest, Petitioner was immediately advised of his rights and upon being transported to the Sheriff's Office Petitioner signed a waiver of rights form. (T. 1222, 1224, 1314, 1316). Petitioner subsequently made a taped statement in the presence of his brother, Sheriff Davis, and Investigator Matthews. (T. 1226, 1251, 1317, 1320). Prior to trial, a Jackson v. Denno hearing was held, after which the trial court ruled that Petitioner's statement had been shown to have been freely and voluntarily made and was thus admissible. (T. 978-1065).

The taped statement, which was later played for the jury, contained Petitioner's account of the events leading to the victim's death. On tape, Petitioner stated that he, Hoerner, and Webster drove to the victim's trailer following Petitioner's suggestion that they see a bootlegger. (T. 1254). On the way to the trailer, the three discussed the idea of robbing the victim. (T. 1254). Before Petitioner and Webster entered the trailer, Hoerner allegedly gave Petitioner a pistol. (T. 1254).

Petitioner stated that they asked the victim for beer, and as the victim turned around, Petitioner drew the pistol. (T. 1255). Petitioner ordered the victim to hand over his money, but the victim refused to comply. (T. 1255). According to the Petitioner, the victim "started towards me and I got scared and I pulled the trigger. I didn't mean to shoot him." (T. 1255). After the victim had been shot Webster grabbed a metal box and ran outside along with Petitioner, where they saw a car driving towards the trailer. (T. 1255-1256). Petitioner told the occupants to get out and lie down on the ground. (T. 1256). When Petitioner, Webster, and Hoerner left the scene of the murder, Hoerner drove the getaway car into a ditch where it got stuck. (T. 1257). Hoerner told Petitioner to get the other car, but while Petitioner was attempting to start the other car, Hoerner managed to get the getaway car out of the ditch. (T. 1257). Petitioner threw away the keys to the other car, and later Petitioner and his cohorts abandoned Hoerner's car on a dirt road. (T. 1257). Petitioner further admitted that he took change from the victim's pockets and that he did not see the victim with a pistol at any time during the commission of the robbery and murder. (T. 1260-1261).

According to Matthews, Petitioner also told him that Webster had thrown the metal box into the woods after telling Petitioner he had wiped off all their fingerprints. (T. 1278, 1279). Petitioner further told Matthews that he and his co-indictees had wiped their fingerprints off Hoerner's car before it was abandoned. (T. 1280).

Both Petitioner and his brother, Donald Dick, testified that Matthews told Donald Dick to urge Petitioner to confess otherwise Petitioner would receive the "chair." (T. 1342, 1385). Petitioner's brother claimed that he told Petitioner to confess so that he (Petitioner) could avoid the death penalty. (T. 1348, 1385). Petitioner stated that he gave his statement because he believed his brother and thought the confession would prevent him from receiving a death sentence. (T. 1385).

At trial Petitioner and his brother testified that Petitioner had a serious drinking problem which had grown worse over the past few years. (T. 1356, 1359, 1390). Petitioner testified that he shot the victim as the victim advanced towards him, and that he did not really mean to shoot him. (T. 1395).

Further facts will be developed as needed for a more thorough illumination of any issues presented here on this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA UPON ITS REVIEW OF PETITIONER'S CONVICTIONS AND SENTENCES ON DIRECT APPEAL PROPERLY CONCLUDED THAT PETITIONER'S CONFESSION WAS FREELY AND VOLUNTARILY MADE. (Contention No. 1).

On this first contention Petitioner alleges that his confession was not freely and voluntarily made because he was too frightened to make an intelligent waiver of his constitutional rights, that the state failed to affirmatively show that he (Petitioner) stated prior to questioning that he did not want an attorney, and that Petitioner's weakened physical condition at the time of his arrest was exploited by the police in order to secure a confession.

As a prerequisite to its admission into evidence, Ga. Code Ann. § 38-411 requires that the confession of a criminal defendant be voluntarily made.

> "To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slighest hope of benefit or remotest fear of injury."

The burden upon the State is to show the confession to be voluntary by a preponderance of the evidence considering the totality of the circumstances. Boulden v. Holman, 394 U.S. 478, 480 (1969). Pierce v. State, 235 Ga. 237, 239 (1975).

In this instant case a hearing pursuant to Jackson v. Denno, 378 U.S. 395 (1964), was held outside the presence of the jury to determine the voluntariness of Petitioner's confession. At the aforementioned hearing Investigator Russell Matthews of the Dawson County Sheriff's Department testified that on the evening of June 30, 1979, he took a taped statement from Petitioner at the Sheriff's Office in the presence of Sheriff John Davis, and Petitioner's brother Donald Dick. (T. 977-979). Detective Matthews testified that Petitioner was arrested at approximately 8:30 a.m. on June 3, 1979, at which time Petitioner was advised of the Miranda warnings and of his constitutional rights by Sheriff Davis. (T. 982). Petitioner was also informed that he was a suspect in a murder investigation. (T. 982). Detective Matthews further testified that at the time of arrest Petitioner was fully clothed and appeared to be only exhausted. (T. 990, 982). Detective Matthews also testified that he did not detect the odor of alcohol on Petitioner's person. (T. 983).

After being transported to the jail Petitioner was asked if he wanted to make a statement. After reading and signing a waiver of rights form Petitioner recanted and refused to make a statement, but Petitioner did ask to use a telephone. (T. 984, 982, 993-994, 997, 1000). Detective Matthews further testified that Sheriff Davis allowed Petitioner to use a telephone. (T. 984). Detective Matthews further testified that throughout his contacts with Petitioner on the day of June 3, 1979, Petitioner never asked to see or talk with an attorney. (T. 989, 990).

Upon arrest Petitioner initially contended that the police had arrested the wrong person. (T. 989). On several occasions Petitioner was asked if he wanted to make a statement, however Petitioner continued to refuse to make a statement.

During the latter part of the day on June 3, 1979, Petitioner's brother was allowed to visit. As noted by the Supreme Court of Georgia on its review of this instant case, whether a prisoner is allowed to see relatives is a significant factor bearing upon a determination of voluntariness. See Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980). The facts of this case further reveal that Petitioner was again advised of the Miranda warning and of his constitutional rights. Petitioner then gave his statement in the presence of Detective Matthews, Sheriff Davis, and his brother. Detective Matthews testified that Petitioner was not threatened, coerced, or induced into making his statement to police. (T. 979-980).

Detective Matthews further testified that he did not discuss the details of his investigation with Petitioner's brother, nor tell Petitioner's brother that if Petitioner did not confess Petitioner would receive the death penalty at trial. Detective Matthews also testified that he did nothing to frighten Donald Dick into forcing his brother (Petitioner) to confess. (T. 1005-1007, 1010-1012).

At the conclusion of the presentation of evidence on the Jackson v. Denno hearing the trial court ruled that Petitioner's confession had been shown to have been voluntarily and intelligently made. Where the State makes a prima facie showing of the voluntariness of a defendant's confession, after advisement of his or her constitutional rights as in this instant case, the confession is admissible and it is for the jury to

determine whether or not the statement was made freely and voluntarily. Boulden v. Holman, supra. Jurek v. Estelle, supra. Stapleton v. State, 235 Ga. 513 (1975). Further, unless shown to be clearly erroneous the factual determinations of the trial court should not be disturbed on appeal. See generally, Jackson v. Denno, supra. Pierce v. State, 235 Ga. 237 (1975).

B. THE SUPREME COURT OF GEORGIA PROPERLY CONCLUDED THAT THE TRIAL COURT DID NOT ERR BY NOT CHARGING SUA SPONTE THE LAW OF FELONY MURDER AND VOLUNTARY MANSLAUGHTER IN THE ABSENCE OF A TIMELY REQUEST FOR THE SAME BY PETITIONER. (Contention No. 2).

On this contention Petitioner alleges that the trial court erred by not charging sua sponte the law of felony murder and voluntary manslaughter. Counsel for the Respondent notes that an examination of the record reveals, and Petitioner here on this instant petition admits, that at trial no request to charge on these subjects were submitted. While Petitioner contends that the foregoing offenses were lesser included offenses of malice murder, the Respondent initially notes that the Supreme Court of Georgia has stated on numerous prior occasions that the failure to charge on a lesser included offense, absent a timely request for the same, is not error. Montgomery v. State, 241 Ga. 396 (1978); Jackson v. State, 239 Ga. 40 (1977); State v. Stoneaker, 236 Ga. 1 (1976).

Also, as regards Petitioner's contention that a charge on voluntary manslaughter was warranted by the evidence, an examination of Ga. Code Ann. § 26-1102 reveals that in order to warrant such a charge the evidence presented must show that the slayer acted:

(1) Solely as the result of a sudden, violent, and irresistible passion resulting from . . .

(2) serious provocation sufficient to excite such passion in a reasonable person.

Thus, in order to warrant a charge on voluntary manslaughter the evidence at trial must not only show an act of violent passion, but also some serious provocation sufficient to excite such passion in a reasonable person. Reeves v. State, 234 Ga. 896 (1975); Young v. State, 232 Ga. 285, 290 (1974); Brock v. State, 208 Ga. 318 (1951). In this instant case there was no evidence of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. The State's evidence revealed that Petitioner deliberately shot and killed the victim during the commission of an armed robbery. At trial the Petitioner merely contended that he shot and killed the victim because the victim refused to turn over his money to the Petitioner and allegedly took several steps toward the Petitioner. Thus, as a charge on voluntary manslaughter was not warranted by the evidence the trial court did not err by not sua sponte charging the same. Joiner v. Joiner, 225 Ga. 699(5) (1969).

Here on this instant petition for a writ of certiorari Petitioner relies primarily upon this Court's decision in

Beck v. Alabama, ___U.S.___, 65 L.Ed.2d 392 (1980), in support of his contention that "because the jury was not permitted to consider a verdict of guilty to a lesser included offense and the evidence would have supported such a verdict," Petitioner's conviction for murder and sentence of death should be reversed. (Petitioner's Brief at 18). As is readily apparent upon an examination of Beck v. Alabama, supra, the same is inapplicable to the facts of this instant case. In Beck v. Alabama, supra, this Court reviewed a sentence of death imposed under a statutory scheme wherein the trial judge was "specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense." Id., at 397. As noted by this Court in Beck v. Alabama, supra, the aforementioned statutory scheme required that the jury either convict the defendant of a capital crime, in which case it is required to impose the death penalty, or acquit the defendant thus allowing him to escape all penalties for his alleged participation in the crime.

Unlike the Alabama statutory scheme reviewed in Beck v. Alabama, supra, under Georgia law there is no prohibition which prevents counsel for defendants from timely requesting a charge on the law of any lesser included offenses warranted by the evidence. In this instant case no such charges were requested, and under Georgia law the trial court is not required to sua sponte charge the same. Accordingly, the rationale applied in Beck v. Alabama, supra, is inapplicable to this instant case, and this contention is clearly without merit.

C. THE SUPREME COURT OF GEORGIA CORRECTLY CONCLUDED UPON ITS REVIEW OF THE TRANSCRIPT OF THE VOIR DIRE OF PETITIONER'S PROSPECTIVE JURORS THAT NONE WERE IMPROPERLY EXCLUDED UNDER WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1967).

On this instant petition for a writ of certiorari Petitioner contends that four veniremen were improperly excluded under Witherspoon v. Illinois, 391 U.S. 510 (1967). Accordingly, Petitioner asserts that his sentence of death should be vacated and that the Supreme Court of Georgia erred for not doing so.

In Witherspoon, supra, this Court stated that a prospective juror can be excluded for cause based upon his or her conscientious objections to the death penatly when that juror unambiguously states that he or she would automatically vote against imposition of capital punishment no matter what the evidence at trial might reveal. Maxwell v. Bishop, 398 U.S. 262, 265 (1977); Boulden v. Holman, 398 U.S. 468 (1969). Spinkellink v. Wainwright, 578 F.2d 582, 592 (5th Cir. 1978).

A reading of the transcript of the voir dire examination of the veniremen challenged on this instant petition reveals the following.

NANCY ANN MOON

"Q. Then, in your opinion, if the evidence warranted it and the law as given you in charge warranted it, from the Court's charge, you could impose the death penalty?

A. I guess I would be more for life than I would for the death penalty.

Q. My question is -- and don't let me upset you with this -- would you under any circumstances impose the death penalty?

A. No.

MR. WAYNE: I think that disqualifies her.

THE COURT: Any other questions, Mr. Davis?

MR. DAVIS: I don't think she is disqualified. She stated earlier, that under proper circumstances, she --

THE COURT: Wait a minute. You can ask her anything you want to, but I'll make the decision, Mr. Davis. Go ahead. Do you have any questions to ask her?

Q. Ms. Moore: After hearing the evidence and if you thought that the evidence absolutely demanded that you return the death penalty, could you do that?

A. That's an awful hard question.

Q. But there are some circumstances when you could return the death penalty, is that correct? Or a circumstance.

A. I guess, really, I couldn't. I really don't approve of the death penalty. I just don't think I have a right to judge.

THE COURT: Any other questions?

MR. DAVIS: No, Sir.

THE COURT: Mr. Wayne.

MR. WAYNE: If the Court please, I think under the lady's honest answers that she is disqualified and the State would so move.

THE COURT: Mr. Davis.

MR. DAVIS: I would disagree, that she is qualified.

EXAMINATION BY THE COURT

Q. Ma'am, is there any set of circumstances under which you would impose the death penalty, that you can think of?

A. That I would oppose it?

Q. No. Is there any set of circumstances in which you could give someone or let someone receive the death penalty, any circumstances that you can think of? Do you understand the question?

A. That they should receive the death penalty?

Q. Yes, ma'am. Is there any time, if you were sitting on a jury, that you would impose -- do you know what I mean when I say 'impose?' You would return a verdict giving someone the death penalty. Can you think of any time -- is there any time that you would do this?

A. I have never done it before.

Q. Is there any time -- would you do it, are you capable of doing it here this week?

A. I guess not.

MR. DAVIS: Could I ask her one more question?

THE COURT: Sure.

EXAMINATION BY MR. DAVIS

Q. Could you -- not 'would' you -- I'm not asking you if you would automatically give the man the death penalty -- but could you give a man the death penalty, or a woman, but a man in this case, would you give a man the death penalty under some circumstances, under any circumstances?

A. I guess it would really be what the situation was about, and I don't know what happened, really.

Q. We're not asking you to pre-judge, we are just asking you, under circumstances, could you give the death penalty. Could you, not would you We are not asking you to say you are going to. God knows, that is the last thing we want you to make up your mind about, whether or not you would, when you know nothing about the evidence, but could you, under proper circumstances, give a -- return a verdict of death, in any circumstances -- in some circumstances, if you were given a choice?

A. No.

Q. There is no circumstance that you can think of where you could return a death penalty verdict?

A. (No response).

Q. You seem to waiver on that point. If there is some situation, please -- you don't have to explain what it is, but are there any circumstances in the world under which you could bring back the death penalty, you could? I'm not saying you would.

A. No.

THE COURT: Any other questions?

MR. DAVIS: No, Sir.

THE COURT: The Court is going to rule that she is disqualified for cause. You may step down and please go into the jury room. What you said here, please do not repeat it. Don't discuss what you said or anyone else said in

the courtroom with anyone else.

(The juror left the courtroom)." (T. 171-175).

JANICE WINKLER HARBEN

"Q. Are you conscientiously opposed to capital punishment?

A. Yes.

Q. Would your attitude towards the death penalty prevent you from making any impartial decision as to the accused's guilt?

A. I don't think so.

Q. Would you automatically vote against the imposition of capital punishment, that is the death penalty, without regard to any evidence that might be produced on the trial of the case?

A. Ask that again, please.

Q. Would you automatically vote against the imposition of the death penalty without regard to any evidence that might be produced on the trial of the case?

A. No response.

Q. In other words, would you just automatically vote against the death penalty, regardless of what the evidence is?

A. It would be hard to say.

Q. Let's go a step further. Could you subordinate or lay aside your personal feelings on the death penalty to your oath as a juror and obey the laws of the State as charged by the Court?

A. I'm afraid -- I don't know whether I could or not.

THE COURT: Mr. Wayne.

EXAMINATION BY MR. WAYNE

Q. If I remember correctly, Ms. Harben, you stated that you are conscientiously opposed to capital punishment?

A. Yes.

Q. Could you, irregardless of being opposed to capital punishment, follow the testimony of the witnesses from the witness stand and the law that the Court gives you in charge, and follow that law, irrespective of the fact you are against capital punishment? Could you vote for it if the evidence from the witness stand said yes, and then applying that evidence -- or the charge of the Court to that evidence that you said yes to, would you still automatically vote against capital punishment?

A. Religious beliefs.

Q. Are you religiously opposed to capital punishment?

A. Yes.

Q. Then, under no circumstances, would you vote for the death penalty?

A. I don't think so.

Q. You don't think you would ever vote for it?

A. No.

MR. WAYNE: Thank you.

THE COURT: Mr. Davis.

MR. DAVIS: No questions.

THE COURT: The State's position?

MR. WAYNE: The State's position is that she should be challenged for cause.

THE COURT: Mr. Davis.

MR. DAVIS: No objections.

THE COURT: Ms. Harben, you are excused from this case. Please do not discuss what you said in here with anyone else. That includes your husband or your family or anyone. Do not allow anyone else to discuss it with you. You may go wherever, but call the Clerk's office about 6:30 and they will tell you when to report back in.

(The juror left the courtroom)." (T. 242-245).

BEVERLY DEMCAK ABBOTT

"Q. Would you automatically vote against imposing the death penalty without regard to any evidence that might be produced on the trial of the case?

A. I don't know. I believe --

Q. Before you answer that, in a case like this, there are two parts to it. In the first part, the jury determines the guilt or innocence of the defendant. If he is found innocent, of course he goes free. If he is found guilty, then we go into the second part.

In the second part, the jury determines punishment. You have two choices, life imprisonment or death.

By explaining that to you, I don't suggest what the verdict should be. This is merely expressing to you the procedure we will follow.

Now, with that explanation, would you just automatically vote against imposing or against the death penalty regardless of what the evidence was in this case?

A. I don't think I would.

Q. Could you subordinate or lay aside your personal feelings on the death penalty as provided in your oath as a juror and obey the laws of the State as charged -- given you in charge by the Court?

A. That's a pretty responsible question, if you don't know the laws.

Q. Again, could you lay aside your personal feelings about the death penalty and follow the law as given you in charge by the Court.

A. Yes, I believe I would.

Q. You said that you were conscientiously opposed to capital punishment. Is that correct? You are against capital punishment?

A. Yes, I am.

Q. Is there any circumstance or any set of facts from which you would impose the death penalty? You don't have to tell me what they are. Is there any time, if the facts and the law warranted it, that you could impose the death sentence? Ever.

A. I don't know what I would do.

Q. I realize that you are nervous and I realize these are very hard questions, and probably the first time you have ever had to work this hard thinking. I apologize for having to put you through it, but it is just one of the parts of freedom, the jury system is.

What I'm asking you is this: You said that you were conscientiously opposed to capital punishment. Taking it a step further, would you ever impose the death penalty, in any case that you can think of? You don't have to tell me what the case is, why, or anything. Just yes or no.

A. I believe I would vote against it.

THE COURT: Mr. Wayne.

MR. WAYNE: No questions.

EXAMINATION BY MR. DAVIS

Q. Can you think of a situation where you would vote along with the jurors to impose the death penalty, in any circumstance, not this case, but any case? Can you think of a situation that would warrant the death penalty.

A. I wouldn't vote for the death penalty.

Q. Did you tell the Court a moment ago that you could lay aside your personal feelings and subordinate your personal feelings and find a man guilty -- Your Honor, what was the rest of that question?

THE COURT: I'm not sure she understood it, but the question was: Could you subordinate or lay aside your personal feelings on the death penalty as required by your oath as a juror and obey the laws of the state as charged by the Court. She said she would obey the laws.

BY MR. DAVIS

Q. You said you would obey the law, as the Court charged you, and you could lay aside your personal feelings and obey the law, is that correct? By that, I don't mean to imply that you are a law breaker, in that vein.

A. I still would obey the law.

Q. You could put aside your personal feelings concerning the death penalty if it had to do with obeying the law?

A. I wouldn't vote for the death penalty.

Q. Under any circumstances? There is no circumstance in your mind that you would vote, along with the jury, for the death penalty?

A. I believe so.

Q. You don't believe so?

A. I believe I would not vote for the death penalty.

MR. DAVIS: That's all.

THE COURT: Any observations, Gentlemen?

MR. DAVIS: I agree.

THE COURT: I'm going to excuse you. The Clerk will give you a telephone number. If you will just call in, it will tell you when -- the recording will tell you when to come in.

(The juror left the courtroom)." (T. 600-604).

DAVID C. INGRAM

"Q. Are there any circumstances under which you would impose the death penalty?

A. No.

Q. Under no circumstances would you impose the death penalty?

A. I don't know whether I'm suppose to judge that or not.

Q. If you are sitting on the jury, under any circumstances would you vote to impose the death penalty?

A. No.

Q. You would not, under any circumstances?

A. No.

MR. WAYNE: That's all.

THE COURT: Mr. Davis?

EXAMINATION BY MR. DAVIS

Q. Mr. Ingram, not particularly in this case, but in any case, any case you have ever heard of, or seen, are there other cases that you could impose the death penalty? I'm not talking about this case in particular, because I realize that you don't know the facts of this case.

MR. WAYNE: That's a statement of fact that he is making to the juror. He's not asking questions.

THE COURT: Yes, sir. Ask him the question, Mr. Davis.

BY MR. DAVIS

Q. Are there any cases of any kind, not particularly this case, where you could vote along with the other jurors for the death penalty? Any crime you can think of, any situation that you have ever heard of, or you can imagine, where you would vote along with 11 or more jurors for the death penalty? I'm not asking you to prejudge this case, by any means.

A. The way it looks here, this man is sitting here, and it's kind of hard to judge.

Q. That's right, but you are not on the jury yet, though. You are being interviewed as a juror. Forget this man and think of other situations, or other times. Could you vote for the death penalty?

A. I guess not.

Q. Are you totally opposed to the death penalty?

A. No, not totally opposed.

Q. If you are not totally opposed, are there any situations, again, that you can think of where the death penalty should be imposed?

A. No, not right off.

Q. Did you understand when the Judge asked you, to begin with, if you were opposed to the death penalty?

A. I think I understood it. I'm nervous.

Q. I realize that. I sympathize with you. I would hate to be at that position, or even having to answer these questions. I think everybody here realizes you are nervous and everybody else that comes up here and answers these type of questions.

Have you, before, thought people should get the death penalty for some crimes that have been committed?

A. I've thought about it. Yes, I guess I have.

Q. Can you think of any of those situations, now, where if you were on the jury that you could be one of the people voting for that death penalty?

A. No, sir.

MR. DAVIS: That's all.

MR. WAYNE: That's cause.

THE COURT: Do you agree that's cause?

MR. DAVIS: Yes, Sir.

THE COURT: Mr. Ingram, I'm going to excuse you. I certainly appreciate you coming in. You have performed a valuable service to the county. I apologize to you for the short notice, but it was necessary that we do that.

I hope it hasn't been too inconvenient. You may be excused.

(The juror left the courtroom)." (T. 883-886).

As is apparent upon an examination of the foregoing voir dire of the four veniremen excused for cause in Petitioner's case, these veniremen were properly excluded under Witherspoon v. Illinois, supra, as they all clearly stated that they would automatically vote against imposition of capital punishment no matter what the evidence at trial might reveal. Further, an examination of Petitioner's trial counsel's responses preceding the court's excusal of veniremen Abbott, Harben, and Ingram reveal that counsel acquiesced in the court's determination that these aforementioned veniremen should be excluded for cause. Respondent contends that in addition to the fact that there exist no violation of the standards set forth in Witherspoon v. Illinois, supra, absent proof by Petitioner that he was rendered the ineffective assistance of counsel at trial Petitioner is bound by the acts of his trial counsel and should not be allowed to attack the same for the first time here on this petition for a writ of certiorari. See generally Williams v. Beto, 354 F.2d 698 (5th Cir. 1965).

For all of the above and foregoing reasons, this contention too is without merit.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented, and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: NOV 5 1980

36220. DENNIS DICK v. THE STATE.

CLARKE, Justice.

The appellant, Dennis Dick, was convicted by a jury in the Superior Court of Dawson County for armed robbery and the murder of O. C. (Red) Rider. He was sentenced to death for murder and to life imprisonment for armed robbery. This case is here on direct appeal and for mandatory review of the death sentence.

SUMMARY OF FACTS

From the evidence presented at trial, the jury was authorized to find the following facts:

The appellant was a resident of Hall County and was familiar with the business establishment operated by the victim, O. C. (Red) Rider, in Dawson County. The victim had acquired a reputation as a bootlegger and was well known throughout Dawson County. Together with Bill Webster and Christopher Hoerner, appellant had been drinking, and about 9:00 p.m. on June 2, 1979, the three companions left in a car belonging to Hoerner for the purpose of getting more beer. As they traveled toward the victim's place of business, the three men formulated a plan to rob the victim. The

familiarity of appellant with the victim's place of business was illustrated by the fact that he directed the driver to the location.

Upon arriving at the trailer in which the victim operated his business, Hoerner gave a pistol to appellant, and appellant and Webster entered the trailer. Finding the victim to be alone, the two men bought a six-pack of beer and paid for it. As the victim turned around, appellant pulled the pistol and told him to freeze and give him his money.

Appellant in his statement admitted shooting the victim one time but told authorities that he did so only when the unarmed victim advanced upon him after refusing to turn over the money. Forensic evidence, however, established that the victim was shot behind the left ear with a 38 caliber pistol. There was also evidence of bruises and abrasions on the victim's forehead and left cheek. When the victim was found, he was lying face down in a hallway of the trailer and was not near the counter where the beer was sold. In addition, a bullet hole was found in the floor next to the victim's head bearing out testimony of witnesses that two shots and not one had been heard. The victim's pockets were turned inside out, and the telephone was found torn from the wall.

While the robbery was still in progress, John Bolton, Doyle Martin and Teresa Grant drove up to the trailer. As they stopped,

Christopher Hoerner, who was acting as lookout, stuck a shotgun out the window of his car and told the three not to move. When Webster and appellant ran out of the victim's trailer, appellant ordered the three out of the car at gun point and told them to lie on the ground. The two robbers then got back into their car to flee but ran the car into a ditch. At this point, appellant returned and told the three persons lying on the ground to run into the woods and not look back or he would kill them. Having chased away the witnesses, appellant attempted to crank their car but was unable to do so. The three robbers were finally able to flee, however, when Hoerner and Webster finally freed their car from the ditch. At about this time, Terry Allen arrived upon the scene and saw someone running across the yard to the car used by the robbers. He went inside the trailer and discovered the body of the victim and contacted the authorities. Appellant and his co-defendants abandoned the car in which they were fleeing after it broke down. Local law enforcement authorities traced the car to its owner through its tag which had been torn off when it went into the ditch. This information subsequently led authorities to the appellant, and he was arrested the next day after he had walked most of the way to Hoerner's trailer from where the car was abandoned. The other two co-defendants were subsequently arrested also. A metal money box was recovered, but the murder weapon was never found.

ENUMERATIONS OF ERROR

(1) The appellant in his first enumeration of error complains that the trial court erred in failing to grant a change of venue. The appellant argues that because of pre-trial publicity and local knowledge of the crime, it was impossible to obtain an impartial jury.

At the outset, we note that the record contains no evidence of prejudicial pre-trial publicity. Appellant concedes that there is no evidence of a "total inundation of the judicial process by the media." Sheppard v. Maxwell, 384 U.S. 333 (86 SC 1507, 16 LE2d 600) (1966); Estes v. Texas, 381 U.S. 532 (85 SC 1628, 14 LE2d 543) (1965).

Rather, appellant relies upon the fact that each prospective juror had heard something about the case. However, each prospective juror not struck for prejudice expressly indicated that he or she could lay aside any opinion he or she had formed and render a sentence based solely upon the evidence. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); Irvin v. Dowd, 366 U.S. 717 (81 SC 1639, 6 LE2d 751) (1960).

The victim was well known in the community but this alone does not indicate that the jury drawn from that community is death prone. Collier v. State, supra.

The record in this case shows that 120 prospective jurors were examined. The appellant was allowed an additional 10 strikes and the state an additional 5. The jurors were examined outside the presence of each other. See Collier v. State, supra. Of these jurors, 49 were excluded for normal cause (prohibited degree of relationship to the victim or prosecutor, unalterable opposition to the death penalty, etc.). Thirteen were excused for prejudice or a fixed opinion as to guilt or innocence. This low percentage of veniremen excused for prejudice (approximately 10%) strongly corroborates the expressions of impartiality by the other jurors who were not excused for prejudice. Murphy v. Florida, 421 U.S. 794 (95 SC 1555, 43 LE2d 772) (1974); Tucker v. State, supra (5% dismissal rate corroborates absence of prejudicial bias); Collier v. State, supra (20% dismissal rate corroborates absence of prejudicial bias); Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976) (46% dismissal rate corroborates absence of prejudicial bias); Butler v. State, 231 Ga. 276 (201 SE2d 448) (1973) cert. denied, 420 U.S. 907 (1974) (36% dismissal rate corroborates absence of prejudicial community bias); cf. Irvin v. Dowd, supra (62% dismissal rate corroborates actual juror partiality).

Furthermore, the appellant failed to exhaust all of his preemptory challenges. Coleman v. State, supra; Davis v. State, 241 Ga. 376 (247 SE2d 45) (1978). We also note that the state

presented an overpowering and overwhelming mass of evidence, on the question of appellant's guilt. The appellant did not dispute such evidence and in fact admitted under oath that he was the triggerman. Under this evidence, no other verdict could have been returned by a rational trier of fact. See Coleman v. State, supra; Jackson v. Virginia, 443 U.S. 307 (99 SC 2781; 61 LE2d 560) (1979).

A motion for change of venue lies within the sound discretion of the trial judge. Coleman v. State, supra; Allen v. State, 235 Ga. 709, 712 (221 SE2d 405) (1975); Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975). We find no abuse of discretion here.

Appellant also asserts that certain jurors were improperly excused in violation of the rule of Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770; 20 LE2d 776) (1968). However, each such prospective juror upon voir dire responded that he or she could not impose the death penalty under any set of circumstances. The jurors' responses satisfied the test set forth in Witherspoon, supra, as reiterated in Lockett v. Ohio, 438 U.S. 586 (98 SC 2954; 57 LE2d 973) (1978). Hance v. State, 245 Ga. 856 (___ SE2d ___) (1980); Collier v. State, supra; Harris v. Hopper, 243 Ga. 244 (253 SE2d 707) (1979).

(2) In his second enumeration of error, the appellant asserts that his confession was not freely and voluntarily given.

Immediately after his arrest, the appellant was taken to the sheriff's office where he signed a waiver of rights. However, he made no statement at that time. Some ten hours later, in the presence of his brother, and after conferring with his brother, he gave local authorities a complete confession. The trial court, after a Jackson v. Denno hearing, admitted the confession, holding it to have been made freely and voluntarily. Appellant argues that but for the urging of his brother with whom he consulted, he would not have confessed. The appellant's brother told him that if he did not confess, he would get the death penalty.

A confession otherwise admissible is not inadmissible because it was prompted by advice of a relative of the defendant. Shavers v. State, 244 Ga. 491 (260 SE2d 883) (1979).[1/]

The appellant further argues that the initial waiver of rights signed the morning of his arrest was not a knowing waiver in that he was tired, hungry, withdrawing from alcohol and emotionally upset at that time

The state introduced evidence that appellant was not drunk nor in such a condition as to be unable to understand the consequences of his action. Moreover, the statement was not taken immediately

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1/ Whether a prisoner is allowed to see relatives is significant in a determination of voluntariness. See Jurek v. Estelle, ___F2d ___ (5th Cir., decided August 11, 1980).

after the arrest but some ten hours later, after appellant consulted with his brother and was again advised of his rights. It is clear from the taped confession that the confession was voluntary. The ten-hour lapse between the time of the waiver and the actual confession at which time the previous warnings were reiterated did not render the confession inadmissible. Stapleton v. State, 235 Ga. 513 (220 SE2d 269) (1975).

Appellant also argues that his brother's advice to confess was the result of an investigator's conversation in which his brother was told to convince appellant to confess or he would face a death penalty. The investigator testified that he never had such a conversation with the appellant's brother and that appellant did not ask to consult with an attorney. This conflict in the evidence was resolved by the trial court in favor of admissibility, and we find no error in the trial court's determination. McClesky v. State, 245 Ga. 108 (263 SE2d 146) (1980); Burney v. State, 244 Ga. 33 (257 SE2d 543) (1979); Amadeo v. State, 243 Ga. 627 (255 SE2d 718) (1979); Johnson v. State, 233 Ga. 58 (209 SE2d 629) (1974).

We also note in this regard that on direct examination during the guilt-innocence phase of the trial, the defendant reiterated his confession and admitted his guilt. Therefore, L.C. v. State, 151 Ga.App. 307 (259 SE2d 702) (1979), cited by appellant, is

inapplicable. This enumeration of error is without merit. Appellant's confession being freely and voluntarily given, appellant's contention that tangible evidence obtained as a result of the confession was improperly admitted is similarly without merit.

(3) In his third and eleventh enumerations of error, the appellant argues general grounds. We find that the evidence in this case overwhelmingly supports a finding of the guilt of the accused by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781; 61 LE2d 560) (1979). These enumerations are without merit.

(4) During the Jackson v. Denno hearing, outside the presence of the jury, the trial judge questioned the defendant as to the presence of telephones in the sheriff's office. Appellant contends that the trial court thereby assisted the prosecution and improperly interfered with the trial of the case. Similarly, appellant complains that at other times during the trial, the trial judge improperly admonished defense counsel. Enumeration of errors 4 and 14 are without merit. Cape v. State, ___ Ga. ___ (Case No. 36298, decided Oct. 7, 1980); Dyke v. State, 232 Ga. 817 (209 SE2d 166) (1974); Wilson v. State, 229 Ga. 224 (190 SE2d 78) (1972).

(5) In his fifth enumeration of error, the appellant contends that the trial court erred in allowing the appellant's confession in evidence in that by doing so, the appellant became a witness against himself, and the appellant was not listed as a witness on the list of witnesses furnished to the appellant. The appellant cites no authority other than the statute itself. Ga. Code Ann. § 27-1403. The purpose of the statute is to "insure that the accused is confronted with testimony against him from witnesses whom he has not had an opportunity to interview prior to trial." Herring v. State, 238 Ga. 288 (232 SE2d 826) (1977). This enumeration of error is without merit.

(6) During voir dire, over objection, the daughter and son of the victim were allowed to remain in the courtroom and assist the prosecution. Appellant alleges error and argues that the court's own order granting a sequestered voir dire was thereby violated. However, the court's order by its terms allowed additional persons to remain during voir dire as the court deemed necessary. The control over such matters necessarily rests within the sound discretion of the trial court and unless that discretion is abused, it will not be controlled by the appellate courts. White v. State, 230 Ga. 327 (196 SE2d 849) (1973). In this case, contrary to appellant's position that the court's action prejudiced

him, in at least one instance, the daughter of the victim was able to inform the court as to persons on the jury who were related to the victim within the prohibited degree. We note that this is a problem in jury selection in some rural counties. A review of the voir dire (see Division 1, supra) disclosed very frank answers regarding prejudice by the prospective jurors. No indication appears on the record nor does appellant demonstrate any prejudice due to the presence of the members of the family during voir dire. Enumeration of Error 6 has no merit.

(7) Under the evidence in this case, appellant was the triggerman and actively participated in the armed robbery including receiving some of the proceeds. There is no merit in the contention that in this case the armed robbery was, as a matter of law or a matter of fact, a lesser included offense of the malice murder. See Hoerner v. State, ___ Ga. ___ (Case 36305, decided September 5, 1980); Pell v. State, 239 Ga. 146 (236 SE2d 47) (1977); Barrow v. State, 235 Ga. 635 (221 SE2d 416) (1975).

(8) In his eighth enumeration of error, appellant contends that the trial court erred in failing to give defendant's request to charge number two.

Defendant's request to charge was as follows: "... generally intoxication or drunkeness is not a defense to a crime, however,

if prolonged drunkeness causes a permanent mania or insanity, then an insanity defense may be used."

No special or general plea of insanity was filed; the defendant instead entered a general plea of not guilty. See Taylor v. State, 245 Ga. 501 (265 SE2d 803) (1980); Lewis v. State, 239 Ga. 732 (238 SE2d 892) (1977); Ross v. State, 217 Ga. 569 (124 SE2d 280) (1962).

The request is not a complete statement of law, and the trial court did not err in failing to charge the request. Peek v. State, 155 Ga. 49 (116 SE2d 629) (1922); Strickland v. State, 137 Ga. 115 (72 SE2d 922) (1911); Ross v. State, supra.

The trial court adequately charged the jury as to voluntary intoxication. Testimony that the appellant began drinking at an early age and sometimes did not remember what happened does not raise an issue of insanity. See Lewis v. State, supra.

Appellant further argues that the court erred in failing to charge his requests to charge in the sentencing phase of the trial. We find no error. Mitigating circumstances are not required to be singled out. Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979). The trial court adequately charged as to Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1978) and Hawes v. State, 240 Ga. 327

(240 SE2d 833) (1978). Failure to instruct in the exact language requested is not error. Pollard v. State, 236 Ga. 587 (237 SE2d 524) (1976). Appellant's sixth request to charge, to wit: "Aggravating circumstances must be outrageously and wantonly vile in that they involve torture to the victim and depravity of mind on the part of the defendant" is an incorrect statement of law, and the court did not err in refusing to so charge. Ga. Code Ann. § 27-2534.1 et seq. Hance v. State, supra.

Appellant's requests to charge that if the jury could not reach a verdict, the trial court would impose a life sentence and that the law presumes a life sentence means that the defendant shall spend the remainder of his natural life in the penitentiary are clearly not principles of law to be given in a charge to a jury and were properly refused.

(9) The appellant in his ninth enumeration of error contends that the trial court erred in admitting state exhibits 2 through 4, 8, 10, 13, 14, 16 through 18, and 20 through 28 in that they are fruits of the poison tree, i.e. a product of an illegal confession. The confession having been determined to be properly admitted, appellant's argument is without merit. See Division 2, supra. Appellant further contends that some of the state exhibits were erroneously admitted over proper objection. Exhibits 2 and 3, photographs of the victim, were admitted over objection. The

remainder of the exhibits were admitted without objection.

It is well settled that photographs, which are relevant and material to issues in the case, need not be excluded on the grounds that they would inflame the minds of the jurors or are corroborative or cumulative of other grounds. Tucker v. State, 245 Ga. 68 (263 SE2d 109) (1979); Mooney v. State, 243 Ga. 373 (254 SE2d 337) (1979). Each photograph depicted the location of the wound, the crime scene and the way in which the victim had been robbed. As such, photographs were material, and the trial court did not err in admitting them into evidence.

(10) In his tenth and seventeenth enumerations of error, the appellant asserts that the trial court erred in admitting the testimony of Dr. Whitcomb and other forensic evidence over objection. Appellant argues that since the cause of death had been stipulated, the testimony of Dr. Whitcomb, who had examined the body of the victim, was prejudicial and inflamed the minds of the jury. The evidence complained of was relevant testimony as to cause of death and the location of the wound, the location of the wound being a crucial part of the state's case. The trial court did not err in admitting the testimony. Relevant evidence cannot be kept from the jury by admission of the fact or waiver of the requirement of proof. Franklin v. State, 245 Ga. 141

(263 SE2d 666) (1980).

(11) In his eleventh enumeration of error, appellant contends that the trial court erred in not instructing the jury as to voluntary manslaughter or felony murder. The trial judge charged the jury as to the crime specified in the indictment, malice murder. Since there is no requirement that a charge on a lesser included offense be given in the absence of a written request, this enumeration is not meritorious. Lamb v. State, 245 Ga. 104 (263 SE2d 143) (1980); Thomas v. State, 243 Ga. 217 (253 SE2d 190) (1979); State v. Stonaker, 236 Ga. 1 (222 SE2d 354) (1976).

(12) Appellant's enumerations of error 12 and 20 through 22 deal with sentence and will be considered in the sentence review portion of the opinion.

(13) In the appellant's thirteenth and fourteenth enumerations of error, he contends that the tape recordings of his confession were improperly admitted into evidence. When the state sought to introduce appellant's taped confession, defense counsel objected on the ground that the proper foundation had not been laid. The trial court instructed counsel to perfect his objection and state what the proper foundation should be. Counsel did not comply. Objection on the ground of a lack of proper foundation without stating what the proper foundation should be is insufficient and presents nothing for consideration on appeal. Newman v. State,

239 Ga. 329 (236 SE2d 673) (1977); Dillard v. State, 128 Ga.App. 747 (197 SE2d 924) (1973). However, pretermitting waiver, this court has examined the record and concludes that the proper foundation for the use of the tapes was laid. Harris v. State, 237 Ga. 718 (230 SE2d 1) (1976); Brooks v. State, 141 Ga.App. 725 (231 SE2d 828) (1977); Solomon, Inc. v. Edgar, 92 Ga.App. 207 (83 SE2d 167) (1955). The record in this case affirmatively shows that the mechanical transcription device was capable of taking testimony, that the operator of the device was competent to operate it, and that no changes, additions, or deletions had been made to the tape. Furthermore, the manner of preservation was shown; the speakers were identified, and the testimony elicited was freely and voluntarily made without duress. See Division 2 herein. In addition, appellant argues that portions of the tape were improper and were not part of the appellant's statement but prejudicial assumptions of the interrogator.

During the interrogation, the officers asked appellant if he had struck the victim. Appellant denied striking the victim. Forensic evidence established bruises on the victim's face. The question was relevant to the inquiry. No prejudice having been shown, this argument is without merit.

(14) The state called the victim's son as a witness. He had been the second person to see the victim after the murder. In

addition, the son worked in the victim's place of business and had knowledge of the amount of receipts. During direct examination, the witness became emotional and began to weep. A recess was taken, and the witness was able to compose himself. The defense counsel moved for a mistrial on the grounds that the state intentionally caused such an emotional outburst and that the defendant was prejudiced thereby. The motion for mistrial was overruled, and we find no error. The emotional outburst in this case consisted of the witness crying. There is no evidence in the record that the witness became hysterical or made any prejudicial comments or threats in the courtroom. The record simply does not support appellant's contention that this witness was placed on the witness stand by the state for the sole purpose of prejudicing the defendant. Furthermore, such emotions are reasonably expected by one who is a close relative of a murder victim. The trial court did not abuse its discretion in failing to grant appellant's motion for mistrial. "Many, if not most, trials by jury involve some degree of emotion by at least one party or the other. It would be unreasonable to expect that all emotions be completely frozen during a trial by jury when such effective bridle on emotions cannot be sustained elsewhere." Associated Distributors, Inc., v. Strozier, 144 Ga.App. 205, 206 (240 SE2d 761) (1977).

Demonstrations and outbursts which occur during the course of a trial are matters within the trial court's discretion unless a new trial is necessary to insure a fair trial. Sheppard v. State, 235 Ga. 89 (218 SE2d 830) (1975). Here the trial court stopped the trial and allowed the witness to compose himself, and it is unlikely that the witness' crying without more prejudiced appellant's defense. Compare Futch v. State, 151 Ga.App. 519 (260 SE2d 520) (1979) with Price v. State, 149 Ga.App. 397 (254 SE2d 512) (1979).

(15) In his eighteenth enumeration of error, the appellant asserts that the trial court erred in failing to grant a mistrial as a result of improper actions, remarks and statements of the district attorney during the trial and in his closing argument. In one instance, the district attorney in cross examining the defendant's brother remarked to the witness, "I wouldn't think they would electrocute me, if I wasn't entitled to it." The defense counsel moved for a mistrial on the grounds that the district attorney was speaking with the witness and not questioning him. The motion was denied, but corrective instructions were given. The decision of whether to grant a motion for mistrial lies within the sound discretion of the trial judge, and his judgment will not be disturbed on appeal absent a showing of abuse of discretion. Sims v. State, 243 Ga. 83 (252 SE2d 501) (1979);

Patterson v. State, 239 Ga. 409 (238 SE2d 2) (1977). Under the circumstance of this case, we find no abuse of discretion.

(16) On direct examination, appellant admitted a prior conviction for statutory rape. He went into the particulars of that offense in an obvious effort to show the jury he had not been convicted of a crime of violence. Appellant contends that the trial court erred in allowing the prosecution on cross examination to go into prejudicial aspects of the prior conviction of the defendant. We do not agree. The prosecutor's questioning sought to show that the defendant used the same defense in the statutory rape conviction as he now was attempting to assert. Each party has the right to a thorough and sifting cross examination of the opposing witness. Ga. Code Ann. § 38-1705. The trial court has the discretion to determine the scope of cross examination, and in the absence of abuse of that discretion, the action of the trial judge will not be disturbed. Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979). Enumeration of Error 16 is without merit.

(17) In his last enumeration of error, appellant asserts that the trial court erred in admitting the indictment of a previous felony committed by the defendant at the presentence hearing since there was no showing that the defendant was represented by counsel or that he intelligently waived his right to counsel.

However, the defendant on direct examination during the trial of the case brought out the conviction of the previous felony and admitted that he had committed that crime. Furthermore, the indictment for the prior felony was admitted without objection and shows upon its face that the appellant was represented by counsel. This enumeration is wholly without merit.

SENTENCE REVIEW

As required by Georgia Law 1973, p. 159, et seq. [Code Ann. § 27-2537(c)(1-3)], we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, the evidence concerning the crime, and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any aribtrary factor. See Division 1 herein.

The jury found the following aggravating circumstance: The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery. Code Ann. § 27-2534.1(b)(2).

During the guilt/innocence phase of the trial, the jury found the defendant guilty of armed robbery. We find the evidence factually substantiates and supports the finding of the statutory

aggravating circumstance, the finding of guilt, and sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra.

(18) The appellant contends in Enumeration 20 that the jury should not have been allowed to reach a verdict of a death sentence as no new evidence was introduced by the state during the sentence phase of the trial. However, the state necessarily under the facts of this case introduced during the guilt/innocence phase of the trial all of the evidence required to support the finding of the aggravating circumstance returned by the jury. This enumeration of error is without merit. See Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978).

(19) In his twenty-second enumeration of error, the appellant contends that the trial court's charge during the sentencing phase of the trial was unjustly weighted toward the state and the death penalty, in that undue weight and emphasis was placed on aggravating circumstances and too little on mitigating circumstances. Appellant argues that the trial court's charging of the three aggravating circumstances upon which the state sought the death penalty was prejudicial. We do not agree. The charge of the court complied with the standards set forth in Spivey v. State, supra; Fleming v. State, supra, and Hawes v. State, supra.

See Jones v. State, 243 Ga. 820 (256 SE2d 907) (1979) and Fleming v. State, 243 Ga. 120 (252 SE2d 609) (1979).

Appellant's co-defendant, Christopher Hoerner, was sentenced to life imprisonment. See Hoerner v. State, Case 36305, decided September 5, 1980. The question thus presented is whether appellant's sentence is disproportionate considering the crime and the defendant in light of the lesser sentence imposed on a co-defendant.

There is no simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence. McClesky v. State, 245 Ga. 108 (263 SE2d 146) (1980); Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979). Each case is evaluated on its own unique factual circumstance.

As in McClesky v. State, supra, we find material distinctions between appellant's case and the case of the other co-defendant. First, the appellant was the actual perpetrator of the murder, whereas the other defendant was not in the immediate area of the killing but was stationed outside as a lookout. Juries under similar circumstances have sentenced triggermen to death while the same penalty has not been imposed on co-defendants. These cases have been affirmed by this court. Goins v. State, 245 Ga. 62 (262 SE2d 818) (1980); Ross v. State, 233 Ga. 361 (211 SE2d 356)

(1974); Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976); Pulliam v. State, 236 Ga. 460 (224 SE2d 8) (1976); Bowden v. State, 239 Ga. 821 (238 SE2d 905) (1977).

Contrary to appellant's position, this case is not controlled by the recent United States Supreme Court decision of Godfrey v. Georgia, 27 CrL 3115, 48 USLW 4541 (U.S., May, 1980). In Godfrey the court was concerned with a sentence of death resting exclusively on Code Ann. § 27-2534.1(b)(7). The other statutory aggravating circumstances are more "specific and measurable." Godfrey v. Georgia, supra.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. The evidence shows that this was the intentional killing of an unarmed victim of an armed robbery. It was a coldblooded killing perpetrated solely for the purpose of monetary gain. We find that the following similar cases listed in the Appendix support affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the sentence imposed in similar cases considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

APPENDIX

(1) LINGO v. STATE, 226 Ga. 496 (175 SE2d 657) (1970)
(2) JOHNSON v. STATE, 226 Ga. 511 (175 SE2d 540) (1970)
(3) PASS v. STATE, 227 Ga. 730 (182 SE2d 779) (1971)
(4) HUNTER v. STATE, 231 Ga. 494 (202 SE2d 441) (1973)
(5) GREGG v. STATE, 233 Ga. 117 (210 SE2d 659) (1974)
(6) MOORE v. STATE, 233 Ga. 861 (213 SE2d 829) (1975)
(7) FLOYD v. STATE, 233 Ga. 280 (210 SE2d 810) (1974)
(8) PREVATTE v. STATE, 233 Ga. 929 (214 SE2d 365) (1975)
(9) MITCHELL v. STATE, 234 Ga. 160 (214 SE2d 900) (1975)
(10) TAMPLIN v. STATE, 235 Ga. 20 (218 SE2d 779) (1975)
(11) BERRY HILL v. STATE, 235 Ga. 549 (221 SE2d 185) (1975)
(12) BARROW v. STATE, 235 Ga. 635 (221 SE2d 416) (1975)
(13) BROWN v. STATE, 235 Ga. 644 (220 SE2d 922) (1975)
(14) DOBBS v. STATE, 236 Ga. 427 (224 SE2d 3) (1976)
(15) ARNOLD v. STATE, 236 Ga. 534 (224 SE2d 386) (1976)
(16) PULLIAM v. STATE, 236 Ga. 460 (224 SE2d 8) (1976)
(17) HAWES v. STATE, 240 Ga. 327 (240 SE2d 833) (1977)
(18) CORN v. STATE, 240 Ga. 130 (240 SE2d 694) (1977)
(19) AMADEO v. STATE, 243 Ga. 627 (255 SE2d 718) (1979)
(20) JONES v. STATE, 243 Ga. 820 (256 SE2d 90) (1979)
(21) HAMILTON v. STATE, 244 Ga. 145 (259 SE2d 81) (1979)
(22) COBB v. STATE, 244 Ga. 344 (260 SE2d 60) (1979)
(23) DAMPIER v. STATE, 245 Ga. 427 (265 SE2d 565) (1980)